No. 92-879

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BELLSOUTH CORPORATION,

Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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*LARRY L. SIMMS
PHILLIP H. RUDOLPH
JOHN K. BUSH
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

ROBERT E. COOPER
JAMES R. MARTIN
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

WALTER H. ALFORD
MARK D. HALLENBECK
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Suite 1700
Atlanta, Georgia 30367
(404) 249-2690

Attorneys for Petitioner BellSouth Corporation

**Counsel of Record*

QUESTION PRESENTED

Whether, consistently with Article II's assignment of the federal prosecutorial power to the Executive and Article III's strict limitations on the exercise by the federal courts of non-judicial functions, a federal court may, pursuant to its interpretation of a consent decree, arrogate to itself and confer on a private litigant the Executive's exclusive authority to enforce federal law by rejecting the Executive's determination that relaxation of a restriction imposed by that consent decree would be procompetitive.

RULE 14.1(b) AND RULE 29.1 STATEMENTS

Parties Below: In addition to BellSouth Corp. and American Telephone & Telegraph Co., parties to the proceedings in the court below included: Ameritech; Bell Atlantic Corp.; MCI Communications Corp.; NYNEX Corp.; Pacific Telesis Group; Southwestern Bell Corp.; United States; US WEST, Inc.; U.S. Telephone Ass'n; GTE Corp.

Subsidiaries: BellSouth Corp. is a publicly held corporation. Its wholly owned subsidiaries BellSouth Telecommunications, Inc., Southern Bell Telephone and Telegraph Co., South Central Bell Telephone Co. and BellSouth Capital Funding Corp. have securities in the hands of the public. BellSouth Capital Funding Corp.—Australia Ltd., a partially owned subsidiary of BellSouth Capital Funding Corp., has issued securities that are in the hands of the public. BellSouth Corp. partially owns Air Call Communications Ltd., which is also partially owned by Air Call, PLC, a company whose securities are publicly traded in the United Kingdom.

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In 1983, this Court summarily affirmed the order of the District Court in this case by which an antitrust suit brought by the United States against American Telephone & Telegraph Co. ("AT&T") was settled, without adjudication, through entry of a consent decree. In that appeal, three Justices of this Court, *sua sponte*, expressed serious doubt that the exercise by the District Court of the power to subject the consent decree to review under the "public interest" standard specified by statute could be squared either with the assignment of Executive (prosecutorial) power to the Executive Branch or with Article III's limitations on the assignment of non-judicial functions to the federal courts. *See Maryland* v. *United States*, 460 U.S.

1001, 1004-06 (1983) (Rehnquist, J., dissenting, joined by Burger, C.J., & White, J.).

The vice first identified by the dissenters in *Maryland* v. *United States* has, almost a decade later, yielded a result that not only emasculates the exclusive constitutional authority of the Executive to enforce the federal antitrust laws, but allows for the District Court's dubious exercise of that Article II power based upon the unilateral action of a party to the decree—AT&T. In this case, AT&T exercised that power to further its own anticompetitive interests to the detriment of petitioner, the people of the Nation whose interests it is the duty and responsibility of the Executive to protect, and our constitutional system of separation of powers. The Court must intervene now to correct this unconstitutional exercise of power by the District Court. The ongoing and pervasive regulation of the national telecommunications industry by that Article III court under the rubric of interpreting a consent decree is questionable at best; such an exercise of purported judicial power cannot, in any event, be permitted to thwart the Executive's authority to enforce the federal antitrust laws.

OPINIONS AND ORDERS BELOW

The opinion of the District Court, filed July 13, 1990, is reported at 131 F.R.D. 647 and reproduced at App. 37a-44a. The unreported opinion of the District Court denying reconsideration, filed on September 6, 1990, is reproduced at App. 45a-46a. The opinion of the Court of Appeals, filed July 24, 1992, is reported at 969 F.2d 1231 and reproduced at App. 1a-36a.

JURISDICTION

The District Court had jurisdiction under 15 U.S.C. § 4 and 28 U.S.C. §§ 1331 and 1337. The jurisdiction of the Court of Appeals was based upon 28 U.S.C. §§ 1291 and 1292(a). This petition is being filed within the time per-

mitted by the Rules of this Court as extended by the October 14, 1992 order of Chief Justice Rehnquist (A-299). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND DECREE PROVISIONS INVOLVED

This case involves Articles II and III of the Constitution, § 2 of the Sherman Act, 15 U.S.C. § 2, and relevant provisions of the 1982 AT&T antitrust consent decree, which are set out verbatim at App. 47a-52a.

STATEMENT OF THE CASE

A. Formation of the Decree

In 1974, the United States brought suit against AT&T and its affiliates, alleging monopolization of the telecommunications industry in violation of § 2 of the Sherman Act.[1] In 1982, the parties reached a settlement of the case and submitted a proposed consent decree to the District Court for its approval. Section I of the proposed decree required, *inter alia*, that AT&T divest itself of the portions of its twenty-two Bell Operating Companies that supplied local telephone service. *United States* v. *American Telephone & Telegraph Co.*, 552 F. Supp. 131, 141 (D.D.C. 1982) ("*Decree Opinion*"), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). These pre-divestiture Operating Companies were consolidated in 1984 into the seven regional Bell Operating Companies ("BOCs"), *id.*, at 142, which were not parties to the decree itself. Petitioner BellSouth Corporation is one of those seven BOCs.

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[1] At the time, AT&T was operating under the strictures of an earlier consent decree entered in 1956. *See United States* v. *American Telephone & Telegraph Co.*, 552 F. Supp. 131, 137-38 (D.D.C. 1982) ("*Decree Opinion*"), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

Section II(D) of the proposed decree imposed specific line-of-business restrictions on the BOCs, denying them the opportunity to engage in several business activities including, *inter alia*, the provision of interexchange (*i.e.*, long distance) services. *Id.*, at 186. The Department of Justice, acting on behalf of the Executive, was "the principal proponent of the restrictions on the Operating Companies." *Id.*, at 186 n.227. AT&T agreed to the restrictions "as part of the overall settlement." *Id.*

After conducting a lengthy hearing, the District Court issued an opinion finding that most of the decree's provisions were in the "public interest," but that the court would not approve the decree unless the parties agreed to certain changes. One of the changes imposed by the District Court was the addition of § VIII(C), which allowed for the court's removal, over the objection of the Executive, of restrictions imposed on the BOCs if a BOC could establish "that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." *Id.*, at 231.[2] On the other hand, modifications of § II(D) that were not opposed by the Executive would be evaluated under the common law standard incorporated into § VII of the decree, which inquires whether the modification is in the "public interest."

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[2] Recognizing explicitly that the restrictions themselves were anticompetitive, *Decree Opinion*, 552 F. Supp., at 187, the District Court prescribed a standard for their removal that was less rigorous than that which would normally apply to modifications opposed by the Government, as set forth by this Court in *United States* v. *Swift & Co.*, 286 U.S. 106, 118 (1932), discussed at *infra* pages 16-20. *See Decree Opinion*, 552 F. Supp., at 195 n.266. The standard prescribed by the district court under § VIII(C) to govern modifications contested by the government was nevertheless far more stringent than the common law public interest test that would apply to uncontested modifications. *See United States* v. *Western Elec. Co.*, 900 F.2d 283, 294-95 (D.C. Cir.) ("*Triennial Review Opinion*"), *cert. denied sub nom.* 111 S. Ct. 283 (1990).

United States v. *Western Elec. Co.*, 900 F.2d 283, 306 (D.C. Cir.) ("*Triennial Review Opinion*"), *cert. denied sub nom.* 111 S. Ct. 283 (1990).

The standards for removal of restrictions in §§ VII and VIII(C) are generally in harmony with the allocation of power in the federal system: Where the Executive, acting through the Department of Justice, views the proposed removal as consistent with or in furtherance of the laws that it is constitutionally charged with enforcing, then removal would be presumptively available as being in the public interest; where, on the other hand, the Executive—in the exercise of its constitutional function—opposes the removal of a restriction, a heavier burden is placed on the BOC to prove that removal would not violate the federal antitrust laws.[3] Under this arrangement, the desirability of removing a restriction would be policed by the Executive in roughly the same fashion as the federal antitrust laws would normally be enforced in the absence of a consent decree—through the Executive's discretionary authority to investigate and, as appropriate, to initiate a civil or criminal action under the federal antitrust laws to prevent or terminate conduct believed by the Executive to be anticompetitive.

This case is now before this Court because, in the consent decree as finally approved by the District Court, there is some question whether the "public interest" standard of § VII is to be applied to removal of restrictions that is

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[3] In this case the Department of Justice concluded, in the exercise of the Executive's constitutional functions, that the proposed modification would be procompetitive and would further the goals of the federal antitrust laws. That this is an antitrust case, however, is irrelevant to the basic proposition that the Executive Branch—through the Justice Department—is constitutionally charged with protecting the public interest through the exercise of its constitutional responsibility to enforce the laws of the United States.

unopposed by the Executive but is opposed by AT&T (or any other party to the decree).[4] Put another way, the issue here is whether an objection by AT&T is to be given the same force as an objection by the Executive, triggering the BOC's obligation to meet the more stringent § VIII(C) standard and—critical to the question presented by BellSouth—effectively nullifying the Executive's determination that the proposed removal would be procompetitive.

The parties to the consent decree acceded to the District Court's demands. On direct appeal to this Court, the District Court's finding that the consent decree was itself "in the public interest" was summarily affirmed. *Maryland* v. *United States*, 460 U.S. 1001 (1983).

As stressed by the Solicitor General in urging summary affirmance rather than plenary consideration of the appeal, at issue was the broad question whether, taken as a whole and under all the facts and circumstances, the consent decree was "in the public interest." *See* Motion To Affirm of the United States, at 26. Although the Executive expressed the view that the additional provisions of the decree forced upon the parties by the District Court were "drawbacks," it moved for summary affirmance based upon its conclusion that acceptance of the consent decree "would better serve the public interest than would continued litigation." *Id.*, at 26 n.32. The Executive did not, in its motion to affirm, pose a constitutional challenge to the authority of the District Court to force upon the parties its peculiar view of the "public interest" by insisting upon the modifications. Nor did any of the parties identify the ambiguity in the decree that has brought this case to the Court. The Solicitor General expressly pointed out that in reviewing the judgment on appeal, it was not the function of the Court to "assess[] the merits of particular provisions." *Id.*, at 27 n.33. Thus, the question presented here

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[4] The ambiguity was first recognized by the D.C. Circuit in its *Triennial Review Opinion*, 900 F.2d, at 294 n.12.

by BellSouth was not before this Court in *Maryland* v. *United States*.

The Court's summary affirmance provoked a dissent from then-Justice Rehnquist, joined by Chief Justice Burger and Justice White. In his opinion, Justice Rehnquist questioned the constitutionality of § 2 of the so-called Tunney Act—the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e)—pursuant to which the Executive was restrained from entering that consent decree (or similar decrees) unless "the [district] court shall determine that the entry . . . is in the public interest." 460 U.S., at 1001. The dissent initially questioned whether determination of this "public interest" standard was properly the business of an Article III court given that no judicial findings of relevant markets or anticompetitive activity had been made because the case was to be settled prior to judgment. *Id.*, at 1004.

Of equal, and perhaps greater, concern to Justice Rehnquist was that, analytically, the Tunney Act appeared to confer on federal district courts the authority to reject the Executive's determination that the terms of a particular consent decree terminating an action brought by the Executive to enforce the federal antitrust laws were more in the overall public interest than continuation of the underlying litigation would have been. In short, the dissent questioned the power of Congress to assign to a federal court the power to declare that the Executive's decision to discontinue the prosecution of a case in favor of a settlement on terms acceptable to the Executive was contrary to the "public interest." As the dissent put it,

> The question assigned to the district courts by the [Tunney] Act is a classic example of a question committed [by Art. II of the Constitution] to the Executive. "The province of the court is . . . not to inquire how the executive, or executive officers, perform duties in which they have a dis-

> cretion." *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803) . . . .
>
> The question whether to prosecute a lawsuit is a question of the execution of the laws, which is committed to the Executive by Art. II. There is no standard by which the benefits to the public from a "better" settlement of a lawsuit than the Justice Department has negotiated can be balanced against the risk of an adverse decision, the need for a speedy resolution of the case, the benefits obtained in the settlement, and the availability of the Department's resources.

Id., at 1005-06.

B. The Modification Request At Issue In This Petition

This case arises out of a request by the BOCs to utilize centralized points of interconnection with interexchange carriers to hand off common channel signaling ("CCS"), a form of network control signaling. The purpose of the modification was to permit consolidation of network signaling facilities for interexchange calls while maintaining the present system for the transport of the interexchange communications themselves, thus avoiding needless duplication of facilities.

On February 13, 1989, US West, one of the seven BOCs, moved the district court for, *inter alia*, a declaratory ruling or waiver of certain decree provisions so that the BOCs could provide network control signaling to interexchange carriers from centralized control points located outside the exchange area in which a call originates. BellSouth and the other BOCs supported that motion and requested similar relief.

After conducting an investigation of the competitive effect of centralizing CCS transfer points, the Executive, through the Department of Justice, joined with the BOCs in recommending that the modification request be granted.

The Department expressly determined that "strict adherence to the literal decree requirements" would itself impede competition in the market for interexchange services by imposing "substantial inefficiencies and unnecessary costs" on smaller interexchange carriers.[5]

The modification requests were also strongly supported by a broad cross-section of interexchange carriers. As Teleconnect (one of the smaller interexchange carriers) observed, absent the requested modification, it would be forced either to incur "extraordinary expenses" or to forego use of the CCS signaling capabilities, placing it at a serious competitive disadvantage *vis-a-vis* AT&T and MCI—the nation's two largest interexchange carriers.[6] These same two carriers, both of whom have access to their own CCS networks, were the only opponents of the modification request.

C. The District Court Decision

On July 13, 1990, the District Court denied the BOCs' motions. App. at 37a-44a. Although the Executive supported the motions, and although AT&T's obligations under the decree were unaffected by the proposed modification, the court treated the motions as if they were

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[5] Mem. of the United States in Resp. to US WEST's Motion for a Declaratory Ruling or, in the Alternative, for a Waiver of the Decree Regarding Common Channel Signaling Interfaces, at 2 (May 12, 1989).

[6] Reply of Teleconnect Long Distance Servs. & Sys. Co. in Support of US WEST Request for Waiver, at 10-11 (Apr. 17, 1989). Having been acquired by MCI after its District Court briefs were filed, Teleconnect no longer supports the BOCs' modification request. *See also* Letter From Teledial America to the Honorable Harold H. Greene (Apr. 10, 1989); Letter From Digital Signal Inc. to the Honorable Harold H. Greene (Apr. 10, 1989); Late Resp. of MidAmerican Long Distance Co. to US WEST's Motion for a Declaratory Ruling or, in the Alternative, for a Waiver of the Decree, at 4 (Apr. 27, 1989); United Telephone Ass'n Reply to Resps. to US WEST Motion for a Declaratory Ruling, or in the Alternative, for a Waiver of the Decree, at 10 (Apr. 13, 1989).

requests to modify the line-of-business restrictions of the decree over the *objection* of the Executive. So treating the motions, the court applied the "no substantial possibility" standard of review prescribed in § VIII(C) of the decree. Applying that standard, the court rejected the cost considerations advanced by the BOCs as irrelevant and concluded—flatly contrary to the conclusion reached by the Executive after its investigation of the matter—that the modification would adversely affect long distance competition. App. 44a.

Two BOCs petitioned the District Court for reconsideration, arguing that the court had failed to give proper deference to the views of the Executive. The BOCs specifically argued that the Executive's support of the modification mandated review under the "public interest" standard notwithstanding the opposition of AT&T. The District Court refused this request for reconsideration and specifically rejected the argument that the "public interest" standard of review should govern efforts supported by the Executive to reduce decree restrictions so long as AT&T opposed those efforts. App. at 46a.

In the meantime, on March 26, 1992, the District Court granted an identical request for modification of a consent decree involving GTE Corp. (a decree similar in many respects to the decree at issue here), applying a "public interest" analysis notwithstanding the opposition of AT&T and MCI. App. 53a-56a. This distinct treatment given to an identical requested modification was premised on the fact that AT&T was not a party to the GTE decree, and thus could not, by objecting, bring into play the "no substantial possibility" standard of review in place of the "public interest" standard. *See* App. 55a. This result was reached in spite of the fact that the effects upon AT&T of the modifications of the two decrees would be identical.

D. Proceedings in the Court of Appeals

1. The Majority Opinion

On July 24, 1992, the Court of Appeals, by a divided court, affirmed the decision of the District Court. App. 1a-36a. The Court of Appeals acknowledged that the *Triennial Review Opinion* had reserved the issue of the appropriate standard to be applied to a modification request that is supported by the Executive and the BOCs but is opposed by AT&T. App. 21a. Nevertheless, the Court of Appeals rejected application of the "public interest" standard and applied the more stringent "no substantial possibility" standard of review.

Approaching the problem as one of contract interpretation, the majority asserted that the meaning of § VIII(C) was "not ambiguous; it gives AT&T the right, as a party to the decree, to assert its objection to the BOCs' proposal and thus to invoke section VIII(C)." App. 19a. The court did not attempt to reconcile this assertion with its earlier observation in the *Triennial Review Opinion* that "the applicability of section VIII(C) is not dictated by the plain meaning of its terms." 900 F.2d, at 306.[7] The court also refused to consider the decree's negotiation history in determining whether the parties intended for § VIII(C) to apply to modification requests supported by the Executive but opposed by AT&T. The BOCs submitted "numerous examples of Bell System representatives (who now work for AT&T) professing opposition to the line-of-business restrictions or acceptance of them simply as a step towards an overall settlement." App. 16a-17a. The court concluded

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[7] In the *Triennial Review Opinion*, the D.C. Circuit also observed that because "[t]he Government *opposed* the modification sought in [*United States* v.] *Swift* [*& Co.*, 286 U.S. 106 (1932)], . . . it is not at all clear to us that the stringent, so-called 'unforeseen conditions' test of *Swift* would apply to motions brought by the *DOJ* under section VII." *Triennial Review Opinion*, 900 F.2d, at 294 n.12 (emphasis in original).

that this negotiating history was "of little use" in interpreting § VIII(C), App. 17a, even though in the *Triennial Review Opinion* the court had explicitly relied upon that negotiating history when interpreting the § VIII(C) standard, *see* 900 F.2d, at 306.

The Executive's consent to the proposed modification was deemed by the majority to be essentially irrelevant to the determination of the appropriate level of review. The court rejected the BOCs' contention that "the government's support for a waiver causes the public interest test to govern," calling this argument a "strained interpretation at best." App. 13a. In the majority's view, AT&T's opposition to the proposed modification, standing alone, triggered application of the "no substantial possibility" standard of review regardless of the position taken by the Executive on the merits of the proposed modification.

2. The Dissenting Opinion

In dissent, Judge Williams recognized the pernicious effect of permitting AT&T to transform a modification supported by the Executive into a "contested" request:

> Hitherto, as far as I know, Section II(D) has not been recognized as a market-allocation agreement between the separate firms into which the Bell System was split—new AT&T . . . and the BOCs. The court's present decision gives Section II(D) that effect.
>
> * * *
>
> [A]s an agreement between private firms, the line-of-business restrictions of Section II(D) are simply an agreement of potential competitors to divide the market—i.e., a *per se* violation of the Sherman Act . . . .

App. 25a, 29a.

Judge Williams's analysis goes to the heart of AT&T's claimed power to require application of the "no substantial possibility" standard of review. He questioned the propriety, under the decree and antitrust jurisprudence generally, of permitting a private party to create a "contested" modification, and thereby effectively block its approval by a court where the party's only interest in opposing the modification is to better its competitive position by deterring competition:

> The majority here rules that AT&T's opposition is enough of a "contest" to make a line-of-business change "contested" even when the Department of Justice approves. Thus the rump of the original *defendant*, a firm that has no institutional interest in favoring competition in interexchange markets, simply by crying *nyet* can displace the standard normally governing changes that are not contested by the original plaintiff.
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> * * *
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> The upshot is that restraints originally devised in the name of enhancing competition have now become a private anticompetition agreement between potential competitors (AT&T and the BOCs), to be cheerfully enforced by the courts at the behest of a private party that (naturally) resists intrusion on its turf.

App. 26a, 27a. Judge Williams concluded that, as a result of the majority's decision, restrictions originally determined to be necessary to enhance competition would now be used by a private party to thwart competition. App. 27a. In his view, the court was not required by the text of the consent decree to countenance, and should not have countenanced, that result. App. 27a-35a.

3. Presentation of the Constitutional Question

In the Court of Appeals, neither BellSouth nor the other BOCs interposed express constitutional objections to the

court's interpreting the consent decree to permit AT&T, through the self-interested act of opposing the modification, to override the Executive's determination that modification of the restrictions on the BOCs would be procompetitive and therefore in the public interest. In opposing such an interpretation, however, the Executive made clear its position that even application by the courts of the "public interest" standard could run afoul of separation of powers unless the Executive's determination to modify were given considerable deference by the District Court. As the Executive's brief argued, the District Court's role in reviewing a proposed consent decree modification under the "public interest" standard was "important but limited"—limited to " 'confirm[ing] that the resulting "settlement is 'within the *reaches* of the public interest.' " ' "[8]

In a footnote, the Executive elevated its position—which *a fortiori* would apply with even greater force to a court's application of the "no substantial possibility" standard of review to a decree modification supported by the Executive—to the constitutional level:

> If judicial review under the "public interest" standard were not limited in this way, the court's review of prosecutorial decisions could raise serious constitutional questions. *See* [*United States* v. *Western Elec. Co.*,] 900 F.2d at 289 n.2 (citing *Maryland* v. *United States*, 460 U.S. 1001, 1001-06 (1983) (Rehnquist, J., dissenting) (giving a court " 'a plenary authority to re-decide an executive decision' [citation omitted] raises constitutional issues" concerning the separation of powers)).

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[8] Br. for United States, at 21-22 (*quoting Triennial Review Opinion*, 900 F.2d, at 309 (*quoting United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981) (quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)))).

Br. for United States, at 22 n.34. In its decision, the Court of Appeals made no reference to this constitutional limitation on its ability to choose between the differing interpretations of the consent decree that had, to that point in the litigation, been urged upon it by the parties.

The Executive's position on the constitutional consequences of adopting any standard of review more stringent than a deferential "public interest" standard of review, although set forth summarily, was sufficient to put the Court of Appeals on notice that its adoption of the "no substantial possibility" standard would transgress the separation of powers principles identified in Justice Rehnquist's dissent in *Maryland* v. *United States*. Having adopted the more stringent standard suggested by the ambiguous language of the decree itself, the Court of Appeals has unnecessarily pushed the decree beyond the constitutional limits on the exercise of judicial power established by Article III and has, by applying that standard here, unconstitutionally invaded the exclusive authority of the Executive under Article II to enforce the laws of the United States in its discretion.

REASONS FOR GRANTING WRIT

A. The Constitutional Issue Is Important and Its Resolution Will Have the Salutary Effect of Clarifying the Law Governing Modification of Consent Decrees Throughout the Federal Court System

Consent decrees have become a widely used law enforcement mechanism, not only in the antitrust field but in the areas of taxation, environmental law, securities litigation and litigation seeking reform of correctional institutions. Thousands of decrees are currently on the dockets of the federal courts, and consent decrees have become the preferred mode of resolving the vast majority of antitrust cases brought by the Executive in the exercise of

its Article II power to enforce the laws of the United States.

This Court has never had occasion to articulate the constitutional limitations on the standard of review to be applied to proposed modifications where the Executive, as initiator of the lawsuit leading to the consent decree, concludes that certain decree restrictions no longer serve the purposes for which they were originally imposed, and the Executive seeks, or supports private efforts, to modify or remove those restrictions. Nor has any member of the Court other than the incumbent Chief Justice, his immediate predecessor and Justice White articulated a specific view of the limitations imposed by the separation of powers doctrine on the extent to which the federal courts may second-guess the Executive's view of how federal laws should be applied to conditions that suggest the need for modification of those decrees either to further the public interest or, indeed, to forestall an incipient violation of federal laws.

This Court has addressed the situation where the Executive opposes efforts by parties burdened by decree restrictions to remove or limit those restrictions. This Court's seminal discussion of modification is found in Justice Cardozo's opinion for the Court in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). In *Swift*, the Executive opposed a request by the nation's five leading meatpackers to remove certain line-of-business restrictions imposed by an antitrust consent decree to which they were parties. The Court reversed the lower court's order granting the proposed modification and held that modification would be appropriate only if the meatpackers made "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions." *Id.*, at 119. Thus, for over sixty years it has been understood—although *Swift* itself did not address the issue in constitutional terms—that in deciding to conclude a case brought against a private party by consent decree rather than through a completed ad-

judication, the Executive surrenders *none* of the constitutional, prosecutorial prerogatives that inhere in the Executive under our constitutional system of separation of powers. Indeed, there has been no question since the Court's decision in *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868), that the authority to initiate and terminate litigation brought in the name of the United States rests exclusively with the Executive.

For a number of years after *Swift* was decided, many courts applied the *Swift* standard to all consent decree modification requests, imposing *Swift*'s high standard on any attempt to modify a consent decree. *See* Handler & Ruby, *Justice Cardozo, One-Ninth of the Supreme Court*, 10 Cardozo L. Rev. 235, 248 (1988) ("For many years Cardozo's opinion [in *Swift*] was regarded as the fountainhead of all learning on the modification of consent decrees, with most subsequent opinions starting and ending with his formulation."). At least to some extent this practice arose out of a failure to appreciate the unstated but compelling constitutional underpinnings of *Swift* itself.

Where the stringent *Swift* standard of review is applied to a proposed modification opposed by the Executive, the Executive's constitutionally preeminent role in enforcing federal law—assessing how federal law ought to be enforced with respect to changed circumstances in the context of a "living" consent decree—is preserved. On the other hand, where the Executive is not a party to the decree but a private party is enforcing the law (sometimes against a governmental entity), Executive power is not implicated and there is certainly no constitutional compulsion to apply the *Swift* (or any comparable) standard.[9]

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[9] This Court implicitly recognized as much in *Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748, 757-59 (1992), where the Court rejected application of the *Swift* test in a case in which the plaintiffs were private persons (jail inmates) suing a state government (correctional officials) to enforce federal constitutional standards applicable to

In part due to this failure to understand the *raison d'etre* of *Swift*, the lower federal courts have divided over whether the rigorous *Swift* standard should apply when a private plaintiff moves for a modification that is opposed by an affected private or public defendant.[10]

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detention and incarceration of unconvicted defendants. *See also supra* note 7.

[10] *Compare Boston Chapter, NAACP* v. *Beecher*, 679 F.2d 965, 972 (1st Cir. 1982) (*Swift* test is inapplicable to plaintiff's request for modification), *vacated and remanded for reconsideration of mootness*, 461 U.S. 477 (1983) *and Exxon Corp.* v. *Texas Motor Exch.*, 628 F.2d 500, 503-04 (5th Cir. 1980) (rejecting *Swift* test when plaintiff seeks to modify injunction) *with Rajender* v. *University of Minnesota*, 730 F.2d 1110, 1115 (8th Cir. 1984) (concluding that the *Swift* test applies regardless whether the plaintiff or the defendant seeks modification that is contested by the other side).

Several commentators have noted the lack of coherence among the lower courts concerning when the public interest test should be applied to decree modifications and when the more rigorous *Swift* standard should apply. *See, e.g.*, 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 330b, at 141 & n.7 (1978) (citing cases and noting the divergence of views regarding whether "a more relaxed standard" applies when the government is the moving party"); Note, *Flexibility and Finality In Antitrust Consent Decrees*, 80 Harv. L. Rev. 1303 (1967) (noting lack of clarity in Supreme Court's decisions whether a less strict standard applies to government-supported modification requests and arguing that the "public interest" test should apply); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 Harv. L. Rev. 1020, 1024-25 (1986) (noting the divergence of views regarding whether a less strict standard applies "in cases in which parties—usually the initial plaintiffs—seek to fulfill the purposes of initial decrees by more effective means"); Note, *Requests By the Government For Modification of Consent Decrees*, 75 Yale L.J. 657 (1966) (arguing that Supreme Court's cases establish a less strict standard for review of government-supported modification requests); Zimmerman, *The Antitrust Division's Decree Review and Private Litigation Programs*, 51 Antitrust L.J. 105, 116-17 (1982) ("If the Department [of Justice] wishes to terminate or substantially contract a consent decree and the defendants object, the defendants will argue that the Department must meet the 1932 *Swift* case test and not merely the public interest test or some other, less stringent one. The Department, however, will take the position that

The courts below erroneously assumed that they had a free hand to choose whether to apply the statutory "public interest" standard or the decree's "no substantial possibility" standard based upon their parsing of the text of the consent decree itself.[11] In short, they treated the matter as one of contract having no implications for separation of powers. The fundamental issue presented by this petition is whether those Article III courts were indeed free to pick and choose where, as here, the Executive is a party to the decree, the Executive does have continuing authority and responsibility to enforce the federal antitrust laws pertinent to any modification of the decree, and the Executive has concluded that the requested modification would promote competition and would therefore be in the public interest.

In its present posture, this case presents the other side of the coin first minted in *Swift*. If, as petitioner believes, the result in *Swift* was constitutionally compelled by Article II's assignment to the Executive of the power to enforce federal law, then it would follow that the Executive's *support* of a proposed modification represents the same exercise of law enforcement authority and must be given the same wide constitutional berth as the Executive's opposition to a modification. Just as *Swift* compels courts to give great weight to the Executive's opposition to a modification where the Executive's ongoing law enforcement responsibilities are implicated, it requires, as a matter of logic and constitutional compulsion, great deference where the Executive supports a modification in

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where it is seeking to cut back on or terminate a decree and presents facts and reasons why the objectives of the law it polices would be better served by that contraction, its motion should be granted unless defendants clearly demonstrate the contrary.").

[11] The question whether the Court of Appeals correctly interpreted the decree in this case is before the Court on the petition of the other BOCs. *See* Petition For Writ of Certiorari, *Ameritech* v. *American Telephone & Telegraph Co.*, No. 92- (to be filed by Nov. 21, 1992).

the exercise of its law enforcement responsibilities.[12] That is this case.[13] The Executive, acting through the Department of Justice, considered the proposed modification in precisely the same fashion as it would have done had it ultimately determined to oppose the modification. Had it determined to oppose the modification, the Executive's opposition would have been afforded great deference under the decree's "no substantial possibility" standard as a matter of textual interpretation of the decree. As BellSouth will discuss next, the equivalent deference must be shown to the Executive's exercise of its law enforcement authority no matter what conclusion the Executive reaches.

B. The Decisions Below Cannot Be Reconciled With This Court's Separation-of-Powers Jurisprudence

1. The Decisions Below Usurp the Executive's Constitutional Authority To Enforce Federal Law

For almost two centuries it has been understood that the "province of the [federal] court[s] is . . . not to inquire how the executive, or executive officers, perform duties

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[12] Of course, due process would preclude the District Court from *increasing* a defendant's burden under a consent decree under such a lenient standard, at least absent the defendant's further and express consent.

[13] For purposes of BellSouth's constitutional analysis, the distinction between *Swift*'s standard of review and the "no substantial possibility" standard articulated in the decree makes no difference. The question whether *Swift*'s articulation or the "no substantial possibility" standard (or some other phraseology) would constitute the minimum deference to the Executive's exercise of its law enforcement authority required by Article II is not presented by this petition. A case could arise in which the Executive is a party to a consent decree but takes no position on a proposed modification because in its view acceptance or rejection of the modification carries no implications for its law enforcement responsibilities. In such a case, there is nothing in logic to support the application of the *Swift* standard or any standard more stringent than the common law "public interest" standard, and certainly there is no constitutional compulsion to apply a more stringent standard.

in which they have a discretion." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). In *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976), the Court observed that a "lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to 'take care that the laws be faithfully executed.' Art. II, § 3." Under *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868), terminating such a lawsuit is solely within the discretion of the Executive. These immutable principles that undergird our system of separation of powers stand, at least momentarily, obliterated by the decision below.

The functional utility of consent decrees as a means of exercising and conserving the Executive's law enforcement power and resources depends on the ability of the Executive to maintain its otherwise unquestioned and unquestionable authority under Art. II, § 3, the Take Care Clause, to enforce federal law prospectively in circumstances that develop after the entry of a consent decree. In this case, the Executive has been stripped of its constitutional authority in two ways.

First, the Executive's determination that modification of the decree would be in the public interest has been swept aside as essentially irrelevant by an unnecessary construction of the decree that places in the hands of the original defendant—AT&T—the power to nullify the Executive's view of how the federal antitrust laws ought to be enforced with respect to changed circumstances. As the Executive stated with respect to the substantive antitrust issue involved:

> [W]hen decree restrictions that prohibit the BOCs from entering new businesses or restrict the ways in which they may implement new technology become unnecessary to prevent anticompetitive conduct, they are themselves anticompetitive. AT&T, however, has a strong incentive to oppose pro-

> competitive decree modifications in order to protect itself from the very competition such modifications could promote.[14]

By allowing an objection registered by AT&T to trigger the "no substantial possibility" standard, the courts below have ratified the concept that a private person may nullify the Executive's discretionary decision as to how federal law ought to be applied to changed circumstances. AT&T's objection has the practical effect, under the decree as interpreted by the Court of Appeals, of shifting the burden from AT&T to show why the modification, because supported by the Executive, would not be in the public interest to the Executive and the BOCs, which then had to demonstrate that the modification carried with it "no substantial possibility" of leading to anticompetitive behavior by the BOCs.

This reversal of roles as between the Executive as prosecutor and AT&T as defendant is exacerbated by AT&T's status as a defendant. In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), the Court condemned the practice under which a federal court had appointed counsel for a party to a civil lawsuit, Vuitton, to prosecute a criminal contempt against the opposing party. In that case, much like the case at bar, a consent decree had been entered in settlement of purely private litigation brought under the federal trademark laws. That decree enjoined future violations of the decree by the defendant, and the criminal contempt action was instigated by counsel for Vuitton on the basis of evidence that counsel had gathered.

In declaring the appointment of Vuitton's counsel to be unlawful, the Court observed that "[i]f a Justice Department attorney pursued a contempt prosecution for violation of an injunction benefiting any client of that attorney

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[14] Br. for United States, at 35.

involved in the underlying civil litigation, that attorney would be open to a charge of committing a felony . . . ." *Id.*, at 805. For his part, Justice Blackmun regarded the Court's "conflict-of-interest" ruling to be constitutionally compelled. *Id.*, at 814-15 (Blackmun, J., concurring). As in *Vuitton*, AT&T cannot be faulted for grasping and exercising whatever power to enforce, or block enforcement of, the decree that it could extract from the courts below. That does not, however, justify placing in AT&T's hands the power to nullify the Executive's exercise of its discretion to enforce federal antitrust law in the context of this case anymore than it justified the prosecutorial role assumed by Vuitton's counsel in that case.

Second, the Executive's exercise of its prosecutorial discretion and judgment has been subjected to inquiry and reversal in this case despite the fact that that authority is textually committed to the Executive by the Take Care Clause. This is not an instance where Congress has undertaken to assign to an "independent" prosecutor the authority to bring litigation on behalf of the United States as was sustained in *Morrison* v. *Olson*, 487 U.S. 654 (1988). Rather, the interpretation given the decree by the courts below takes from the Executive and transfers to AT&T and, ultimately, the federal courts, the power to decide what the antitrust enforcement policy of the United States should be.[15] Whether the Executive may be stripped of its enforcement authority under the Take Care Clause by this means presents a substantial question, the resolution of

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[15] The specific usurpation of Executive power presented by this petition is not aberrational. The heading and subheadings of part II of the District Court's opinion in *United States* v. *Western Elec. Co.*, 675 F. Supp. 655, 658-59 (D.D.C. 1987) ("Failure of Department of Justice to Act"; "Past Practice"; "Expectations for the Future"), *aff'd*, 894 F.2d 1387 (D.C. Cir. 1990), and the text of part II of that opinion reveal an Article III court determined to play both judge and prosecutor without any appreciation for the court's proper constitutional function. *See also infra* note 17.

which is important not only to the case at bar but to the administration of myriad consent decrees to which the United States is a party.[16]

2. The Power Exercised by the Federal Courts in This Case Violates Article III

"There is no question but that a waiver here, if granted, would injure the public . . . ." Were these words lifted from an internal debate within the Department of Justice occurring in the context of the Executive's formulation of its response to the waiver motions filed by the BOCs, this case would not be here today. Were these words merely the advocacy of AT&T, the same would hold true. They are neither. Instead, these quoted words articulate the holding of the District Court in this case rejecting the motions of the BOCs. *See* App. 43a. They present in unvarnished relief the extent to which the consent decree, as now interpreted by the courts below, permits the District Court to take on the role of prosecutor. The problem posed may be seen as two-dimensional: (1) what is the public interest; and (2) to whom does the Constitution assign the authority and responsibility to make that determination? However the question is posed, it is manifest that it is no business of the federal courts to involve themselves in the non-adjudicatory function of determining how federal antitrust law *and* policy ought to be applied to proposed conduct that has never been adjudicated to be anticompetitive and that indeed has, after investigation, been deemed by the Executive to be likely to foster competition:

> In short, the language of the Court in *Green* v. *Frazier*, 253 U.S. 233, 240 (1920), seems fully

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[16] As discussed at *supra* note 10 and accompanying text, resolution of this question would also provide useful guidance to the lower federal courts in formulating the legal rules applicable to modifications to and enforcement of consent decrees to which the United States is not a party.

> applicable here: "Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other branches of government." Even though Congress may by statute impose such a duty on the federal courts, they may not perform it. *Muskrat* v. *United States*, 219 U.S. 346 (1911).

Maryland v. *United States*, 460 U.S., at 1006 (Rehnquist, J., dissenting).[17] Whether the proposed modification is or is not in the public interest presents a question no different in kind from the question whether the original consent decree in this case was or was not in the public interest. The Court should grant this petition to resolve, once and for all, whether the federal courts may either be empowered, arrogate to themselves the power, or devolve upon private litigants the authority to decide how the antitrust laws ought to be applied to non-adjudicated facts arising in the context of a typical consent decree—a "decision [that] requires an evaluation of an initial policy decision . . . that is clearly for nonjudicial discretion." *Id.*

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[17] That judicial usurpation of the Executive function can be catching is illustrated by the District Court's denial of a motion filed by AT&T by which AT&T sought to obtain advance notice of certain types of business transactions contemplated by the BOCs that could possibly violate the decree. Constrained by a prior decision of the Court of Appeals, the District Court denied the motion. In doing so, the District Court observed not only that it was prepared to utilize its contempt power to punish consummated violations but that it "expects the Department of Justice to bring appropriate enforcement actions as such violations come to its attention." *United States* v. *Western Elec. Co.*, 131 F.R.D. 645, 647 (D.D.C. 1990). The Department of Justice works for, and reports to, the President, not the federal courts. In addition, this Court has recognized that the Executive, at its discretion, may refuse to honor the request of a federal court to prosecute the very kind of contempts contemplated by the District Court in its opinion denying AT&T's motion. *Vuitton*, 481 U.S., at 801. *See also supra* note 15.

CONCLUSION

The power of the Executive is severely impacted by the decision below. Because the decision has profound implications not only for the Nation's telephone industry, but for the administration of multiparty consent decrees generally, the Court should grant this petition and set the case for plenary consideration. In the alternative, the Court may wish to grant this petition, vacate the judgment below and remand to the Court of Appeals for full briefing and argument of the separation-of-powers issue.

November 20, 1992 Respectfully submitted,

*LARRY L. SIMMS
PHILLIP H. RUDOLPH
JOHN K. BUSH
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

ROBERT E. COOPER
JAMES R. MARTIN
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213)229-7000

WALTER H. ALFORD
MARK D. HALLENBECK
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Suite 1700
Atlanta, Georgia 30367
(404) 249-2690

Attorneys for Petitioner
BellSouth Corporation

**Counsel of Record*

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APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

Nos. 90-5333, 90-5335, 90-5337, 90-5351,
90-5365, 90-5367 and 90-5373.
969 F.2d 1231

UNITED STATES of America
v.
WESTERN ELECTRIC COMPANY, INC., et al. Bell Atlantic Corporation,
Appellant.

UNITED STATES of America
v.
WESTERN ELECTRIC COMPANY, INC., et al. US West, Inc.,
Appellant.

UNITED STATES of America
v.
WESTERN ELECTRIC COMPANY, INC., et al. Ameritech,
Appellant.

UNITED STATES of America
v.
WESTERN ELECTRIC COMPANY, INC., et al. Pacific Telesis Group,
Appellant.

UNITED STATES of America
v.
WESTERN ELECTRIC COMPANY, INC., et al. BellSouth Corporation,
Appellant.

UNITED STATES of America
v.

WESTERN ELECTRIC COMPANY, INC., et al.
Southwestern Bell Corporation,
Appellant.

UNITED STATES of America
v.

WESTERN ELECTRIC COMPANY, INC., and American Telephone and Telegraph Company NYNEX Corporation,
Appellant.

Argued Jan. 21, 1992.

Decided July 24, 1992.

Before: SILBERMAN, WILLIAMS, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Dissenting Opinion filed by Circuit Judge STEPHEN F. WILLIAMS.

SILBERMAN, Circuit Judge:

The seven regional Bell Operating Companies (BOCs or Companies) and the United States appeal from the district court's denial of a waiver of the AT & T consent decree to permit centralized provision of the "signaling" component of long distance telephone calls. The appellants[1] maintain that their motion for a waiver should not be evaluated under the standard set forth in section VIII(C) of the decree—whether the proposal presents *no substan-*

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[1] Because the Companies and the United States each seek reversal of the judgment below, we refer to them together as "appellants," although the government is technically an appellee.

tial possibility of impeding competition—but rather under section VII and the more permissive test for unopposed decree modifications that we applied to the information services portion of the *Triennial Review* case: whether the requested waiver would be *certain* to lessen competition. *See United States v. Western Elec. Co.*, 900 F.2d 283, 308 (D.C.Cir.) (*Triennial Review Opinion*), *cert. denied*, ___ U.S. ___, 111 S.Ct. 283, 112 L.Ed.2d 238 (1990).

We think that the section VIII(C) standard applies and that the BOCs failed to demonstrate that their proposal satisfied that standard. We therefore affirm the judgment of the district court.

I.

The 1982 consent decree settled the government's antitrust suit against the "Bell System" by first separating the BOCs[2] and their monopolies over local telephone ("exchange") service from AT & T and its more competitive long distance ("interexchange") and equipment manufacturing businesses and then—with section II(D)'s "line-of-business" restrictions—prohibiting the BOCs from reentering those and other competitive markets. *See generally United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982) (*Decree Opinion*), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983); *United States v. Western Elec. Co.*, 569 F.Supp. 1057 (D.D.C.) (*Reorganization Opinion*), *aff'd mem. sub nom. California v. United States*, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed.2d 719 (1983).

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[2] The seven BOCs—Ameritech, Bell Atlantic Corp., BellSouth Corp., NYNEX Corp., Pacific Telesis Group, Southwestern Bell Corp., and U S WEST, Inc.—are independent Regional Holding Companies, each controlling several of the Bell System's 22 local operating companies. The Companies are also known as the "RBOCs," "RHCs," or "Baby Bells."

Section II(D)(1) of the decree, which prohibits the BOCs from providing any "interexchange telecommunications services," was implemented, and the scope of the seven BOCs' local monopolies defined, by dividing the country geographically into 164 "exchange areas" (better known as "LATAs").[3] *See generally United States v. Western Elec. Co.*, 569 F.Supp. 990 (D.D.C.1983) (LATA Opinion). Each local operating company (*see* note 2) encompasses several LATAs but is nevertheless allowed to transmit telecommunications information only between points within a single LATA, providing what is, basically, the traditional local telephone service. When a person in one LATA calls a person in another, the BOC serving the caller's LATA must transmit the call to an interexchange carrier such as AT & T or MCI, which then carries the call on its own network across the LATA boundaries, where it is picked up by the BOC serving the called party's LATA. (If the caller and called party live in different LATAs within one Company's region, the same Company both passes and picks up the interexchange call.) Section II(A) of the decree obliges the BOCs to provide such "exchange access" services to all interexchange carriers, and section IV(F) requires them to do so "at a point or points within [a LATA] designated by [the] interexchange carrier."[4] These "points of pres-

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[3] The full text of the consent decree, formally entitled the Modification of Final Judgment, appears in the *Decree Opinion*. *See* 552 F.Supp. at 226-32.

[4] Section IV(F) states, in relevant part:

> "Exchange access" means the provision of exchange services for the purpose of originating or terminating interexchange telecommunications. Exchange access services include any activity or function performed by a BOC in connection with the origination or termination of interexchange telecommunications, including but not limited to, the provision of network control signalling . . . . Such services shall be provided by facilities in an exchange area for the transmission, switching, or routing, within the exchange

ence" in each LATA are thus the locations where the telecommunications networks of the seven Companies and the numerous interexchange carriers interconnect. *See LATA Opinion,* 569 F.Supp. at 994 n. 13.

The telephone "call" that a Company passes to an interexchange carrier consists of two components. One is the actual communication (*e.g.,* the voices) of the calling and called parties. The other is "network control signaling," which directs the operation of the telecommunications network, telling the switches and circuits how and when to set up and disconnect a call. The signaling indicates that a receiver has been picked up, what digits were dialed, whether the called line is ringing or busy, when the phone is hung up, and so forth. When the decree was approved in 1982, almost all signaling was "in-band," meaning that the communication and its associated network control signals were transmitted over the same circuit and therefore delivered to the interexchange carrier at the same location—the carrier's point of presence in each LATA. In-band signaling, however, has significant limitations. Because the signals travel over the same circuit as the callers' communication, they must precede or follow the communication. In-band signaling is also relatively slow and can carry relatively little information.

In recent years a new signaling technology has emerged. In "out-of-band" or Common Channel Signaling (CCS), the signals are transmitted over a system of switches and circuits separate from that of the communications they control. The CCS and communications networks are not parallel but rather linked only at special CCS switches

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area, of interexchange traffic originating or terminating within the exchange area, and shall include switching traffic within the exchange area above the end office and delivery and receipt of such traffic at a point or points within an exchange area designated by an interexchange carrier for the connection of its facilities with those of the BOC.

known as Signal Transfer Points (STPs). Out-of-band signaling is much more efficient than in-band. The CCS network contains only signals, which can be packeted into bursts of information and loaded into a circuit with no gaps; in contrast, a single voice communication takes up an entire circuit, even when the parties are not saying anything. As a result, a single CCS circuit can carry the signaling for over 10,000 calls. Each STP pair, moreover, can be connected to multiple communications switches, allowing a few STP pairs to serve a very large area.

The advantages of CCS are undisputed. Its speed markedly reduces call set-up time—the time between dialing on one end and ringing on the other—a benefit of particular value to long distance service. It also frees circuits for communications by not clogging them while callers listen to busy signals or service announcements. And it provides the technological foundation for a variety of new telecommunications services, including some for which the signaling functions as part or all of the communicated information. For example, CCS enables the telephone number of the calling party to be transmitted to the called party, allowing such caller identification features as distinctive ringing and selective call screening, call waiting, and call forwarding.

The BOCs have begun to deploy CCS networks for use in providing local (intra-LATA) exchange services. The CCS efficiencies and network structure have allowed the Companies to deploy centralized STP pairs, each pair having the capacity to serve several of a Company's LATAs.[5] US WEST's STP pair in Minneapolis, for example, serves U S WEST switches in six of its LATAs. In 1989, in fact, the BOCs predicted that all 164 LATAs could be served by

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[5] That the decree permits the Companies to use centralized STP pairs to support their own intra-LATA services is not in dispute. STPs are deployed in pairs to provide greater reliability. The paired STPs need not be in the same location.

only 27 STP pairs, although many more pairs have been installed in the last three years. The interexchange carriers have also been deploying CCS networks for use in their interexchange systems. AT & T inherited the Bell System's nascent CCS network at divestiture, and MCI has also extended signaling facilities to almost every LATA. The smaller carriers have lagged somewhat behind.

This case is brought because the BOCs have not yet installed an STP pair in *every* LATA and wish to avoid having to do so just to allow the interexchange carriers to connect in *every* LATA. Instead, they would like authority to provide the carriers access to CCS service only at certain centralized locations. Under their proposal, in other words, there would not be a section IV(B) point of presence—at least for this service—in every LATA. The BOCs maintain that meeting the section IV(B) requirement for CCS would be expensive and inefficient for both them and the interexchange carriers, particularly the smaller ones. It is claimed that not all LATAs (especially in less populated areas) have sufficient call volume to cost-justify their own STP and that the smaller carriers also could not afford construction of a CCS link to an STP in every LATA. AT & T and MCI, on the other hand, with significant investment in CCS systems more extensive than their smaller competitors, want interconnections in every LATA so as to benefit from those investments.

In February 1989 US WEST filed a motion in the district court requesting a waiver "of the Decree" to allow centralized signaling interfaces. (Under its proposal, the communications component of interexchange calls would still be provided at the point of presence in each LATA, as would in-band signaling if the carrier so requested.) US WEST purported to act "pursuant to section VII of the Decree," a provision that authorizes the district court to modify the decree upon application of any party.[6] Section

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[6] Section VII states that:

VII does not include any criterion for judging proposed changes, so motions under it are presumed to be governed by the appropriate common law standard. *See Triennial Review Opinion,* 900 F.2d at 305-07. Changes uncontested by any party to the decree are granted if "within the reaches of the public interest," *id.* at 306 (quotation marks omitted)—that is, unless they are "certain to lessen competition," *id.* at 308.[7]

The positions of the decree parties in this case were divided. The other six BOCs supported US WEST's motion and filed similar motions of their own.[8] The Department of Justice (DOJ) told the Companies to file directly in the district court, claiming that the motions did not involve a modification of the line-of-business provisions and so the DOJ pre-screening procedure, *see United States v. Western Elec. Co.,* 592 F.Supp. 846, 873-74 (D.D.C.1984), *appeal dismissed,* 777 F.2d 23 (D.C.Cir.1985), was inapplicable. The DOJ then filed a "memorandum" supporting the CCS waiver request.

> Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this [decree], or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this [decree], for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

[7] By contrast, changes opposed by a decree party—at least when that party is the United States, *see Triennial Review Opinion,* 900 F.2d at 294 n. 12—may be denied unless there is " 'a clear showing of grievous wrong evoked by new and unforeseen conditions.' " *Id.* at 305 (quoting *United States v. Swift & Co.,* 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932)). *But cf. Rufo v. Inmates of Suffolk County Jail,* ___ U.S. ___, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992) (suggesting a more lenient reading of *Swift*).

[8] The BOCs also sought a declaratory judgment that the decree allows them to use centralized CCS interfaces. The government opposed that portion of the motions, the district court flatly denied it, and the Companies have not pursued it on appeal.

However, the remaining party to the decree, AT & T, opposed the Companies' motions, arguing that section IV(F) of the decree expressly obliges the Companies to provide access to network control signaling in every LATA and that the centralization of signaling would allow the BOCs to transmit telecommunications information—the signals—across LATA boundaries in violation of the section II(D)(1) interexchange services ban. AT & T argued that the proposal should therefore be evaluated not under section VII but under the decree's other provision for modification, section VIII(C).[9] That section was added to the decree to establish an explicit standard governing a particularly important type of modification: contested changes in the decree's core line-of-business restrictions.[10] *See Triennial Review Opinion*, 900 F.2d at 291. Section VIII(C) requires a BOC seeking to waive or remove a section II(D) restriction to demonstrate that "there is no substantial possibility that it could use its monopoly power [in the local exchange market] to impede competition in the market it seeks to enter." The Companies' blanket, nationwide waiver proposal, AT & T asserted, could not satisfy that test, and the BOCs were unwilling to limit their request to transitional waivers for the particular LATAs for which a specific showing of low call volume and inefficiency of STP and CCS link installation might be made. MCI, intervening, essentially joined AT & T in these arguments.

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[9] Section VIII(C) states in full:

> The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

[10] Section VIII(C) was added because of a concern that otherwise contested line-of-business modifications would be governed by the stringent *Swift* "unforeseen conditions" test, *see supra* note 7, preventing pro-competitive changes in response to new but foreseeable market conditions. *See Triennial Review Opinion*, 900 F.2d at 291; *Decree Opinion*, 552 F.Supp. at 194-95 & n. 266.

The district court, shortly after our *Triennial Review Opinion* issued, held that the waiver proposal did not satisfy the section VIII(C) test. *See United States v. Western Elec. Co.*, 131 F.R.D. 647, 650-52 (D.D.C.1990) (*Waiver Opinion*), *reconsideration denied*, Civ. No. 82-0192 [1990 WL 139788, 1990 U.S.Dist. LEXIS 12153] (D.D.C. Sept. 6, 1990) (*Reconsideration Opinion*). The BOCs and the Department of Justice appeal.

II.

The dispute between the parties has two main facets. The Companies and the Justice Department contend that the waiver request does not substantially implicate the decree's line-of-business restrictions and therefore that the standard to determine whether it should be granted is not the potentially demanding section VIII(C) test but rather the more relaxed public interest test embodied in section VII. Alternatively, the appellants maintain that the applicability of section VIII(C) turns on the position of the DOJ—the plaintiff and "Prime Mover" in the antitrust case underlying the decree. Even if section VIII(C) would apply had the government contested the CCS waiver, the argument goes, section VII and the public interest test govern here because the DOJ does support the proposal. AT & T's opposition to a modification of a line-of-business restriction, the appellants claim, has no more significance than that of other, non-party interexchange carriers.

The first argument is based on the notion that the centralization of signaling interfaces involves primarily not an *entry* into the interexchange services market prohibited by section II(D)(1) but rather a *redefinition* of the Companies' obligation under section IV(F) to provide network control signaling in each LATA. The appellants assert that a small adjustment in the definition of the BOCs' exchange access monopoly is distinguishable from an "entry" into a new and competitive line of business, even though the CCS

waiver might "affect" the interexchange market.[11] We think that is a distinction without a difference. By that logic, the decree's most sensitive restriction placed on the Companies might be eroded merely by redefining the decree's terms. The Companies could, for example, just as well move to redefine "interexchange telecommunications" as transmission of information from one Company's region to another's, rather than from one LATA to another, vastly expanding the Companies' monopolies. It is therefore plain to us that the CCS waiver would not merely change the details of existing exchange access service, but would allow the BOCs to expand their monopolies over exchange access into a slice of the competitive interexchange services market—maybe a narrow slice, involving (for now) only the transmission of traditional network control signaling between the LATAs in each Company's region, but a slice nevertheless. Therefore, a modification that requires a change in a line-of-business restriction is, *if contested*, governed by the section VIII(C) test.

The more serious argument, that the relaxed section VII public interest standard governs waivers supported by the DOJ whether or not opposed by AT & T—*i.e.*, if the DOJ approves a waiver, it is not "contested"—is largely a product of a footnote in our *Triennial Review Opinion*. *See*

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[11] At oral argument, counsel for the BOCs did not press the claim that centralization of signaling interfaces would not violate the section II(D)(1) restriction at all because the Companies would not transmit "end user communications" across LATA boundaries. Indeed, the Companies propose to transmit signaling information between points in different LATAs for a price (the access charge), and that would appear to make the proposed service "interexchange telecommunications" and "telecommunications service" as defined in sections IV(K) and (P) of the decree. *See United States v. Western Elec. Co.*, 907 F.2d 160, 163-64 (D.C.Cir.1990) (*Gateway Opinion*) (discussing interpretation of section II(D)(1)), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1018, 112 L.Ed.2d 1100 (1991); *see also Reconsideration Opinion*, Mem. at 1-2 ("[T]he transport of signaling messages over LATA boundaries is an interexchange function . . . ."); *Waiver Opinion*, 131 F.R.D. at 650 (same).

900 F.2d at 294 n. 12. We affirmed, in that case, the district court's refusal to lift the decree's ban on the BOCs' manufacturing of telephone equipment, *see id.* at 301-04, but reversed a similar refusal to allow the Companies to provide information services, *see id.* at 305-09. We drew a distinction between proposed modifications of the line-of-business restrictions that were unopposed by the other two parties to the decree (the government and AT & T), and waivers contested by either or both of them. The latter were governed by the section VIII(C) standard, whereas uncontested proposals were to be judged by the more lenient "within the reaches of the public interest" standard. *See id.* at 305-07.

We also noted that the decree contemplated that only the Companies could petition under section VIII(C) for modification of the line-of-business restrictions. *See id.* at 294-95. Therefore, if the DOJ wanted an alteration of those restrictions it would necessarily proceed under section VII, the provision authorizing any party to seek decree modifications. *See id.* at 294. We then added a footnote raising a question as to what standard would apply to such a motion:

> The Government opposed the modification sought in *Swift,* and therefore it is not at all clear to us that the stringent, so-called "unforeseen conditions" test of *Swift* would apply to motions brought by the DOJ under section VII. *Since the DOJ is, as plaintiff, the "Prime Mover" of this case, it may well be that modifications it seeks should be evaluated under a standard somewhat more akin to the "public interest" test of the Tunney Act.* Still, it is true that the line of business restrictions were part of what AT & T bargained for in the original decree, therefore suggesting that the modification requests that AT & T opposes should perhaps be viewed differently from those that all the parties agree to. We need not pass on this

> issue here since the DOJ brought no motion under section VII.

Id. at 294 n. 12 (emphasis in original deleted; new emphasis added).

Appellants, relying exclusively on the italicized portion of the footnote, assert that by asking the question of what standard applied, we answered it—that we have strongly implied that the government's support for a waiver causes the public interest test to govern. That is a strained interpretation at best, since we have clearly indicated that if AT & T opposes a line-of-business modification, then DOJ's support, in whatever form, does not relieve the Companies from meeting the section VIII(C) test. Thus, in the *Triennial Review Opinion* itself we treated the BOCs' motion to remove the manufacturing line-of-business restriction as contested and subject to the section VIII(C) standard notwithstanding DOJ's support for the proposal. *See id.* at 301. And in the subsequent *NYNEX Procurement Opinion (United States v. Western Elec. Co.,* 907 F.2d 1205 (D.C.Cir.1990)), where it was the Justice Department that formally moved for a waiver of a section II(D) restriction, we said that the Department "bears the same burden that [the BOC] would" and remanded for the district court to determine whether AT & T had properly opposed the waiver. *See id.* at 1207-09 & n. 3.

Appellants nevertheless, and for the first time in this series of cases, squarely challenge the proposition that AT & T's opposition to a proposed change should have such important consequences as to trigger the more stringent section VIII(C) standard. They argue that AT & T's "rights" under the decree are unaffected by changes in the line-of-business restrictions on the BOCs, and therefore that AT & T's "legal or equitable status" in relation to the CCS waiver should be thought no different than any other interexchange carrier's—*i.e.*, not significant enough to affect the standard by which we evaluate the proposal.

See Triennial Review Opinion, 900 F.2d at 292, 305-07 (opposition by non-party intervenors does not make the information services modification "contested" and subject to the section VIII(C) test). Appellants point in particular to the Justice Department's role as the "principal proponent" of the line-of-business restrictions, *Decree Opinion*, 552 F.Supp. at 186 n. 227, and to AT & T's professed neutrality or opposition to those restrictions during the decree negotiations. As those provisions were not part of the "bargain" AT & T sought, we are told, AT & T's opposition to their alteration now should be deemed legally inconsequential.

It is, however, those line-of-business restrictions that prevent the Companies from a full-bore entry into the interexchange market. It seems more than passing strange to suggest that the decree should be interpreted so as not to allow AT & T to contest, under section VIII(C), the BOCs' complete entry into the interexchange market. After all, the *AT & T* lawsuit was based on the premise that a corporation that enjoyed a monopoly on local calls would ineluctably leverage that bottleneck control in the interexchange (long distance) market. *See id.* at 142, 188-89. The Bell System was *for that reason* broken up; the local monopolies were taken away from AT & T. (Of course, "AT & T" is a different entity after the decree than it was before.) To claim that AT & T has no interest under the decree in challenging one or more of the Company's "return" to the interexchange market, there to compete against AT & T with the same sort of local monopoly leverage that caused the government to bring suit against AT & T in the first place, has an ironic, even Kafkaesque, quality. By the appellants' logic, if the BOCs' proposed entry into the interexchange market was *likely* to impede competition (which would violate the section VIII(C) test) but not *certain* to do so (thus surviving section VII's public interest test), and if the government did not object, the district judge would be obliged to permit the entry. Are

we to believe that AT & T had in 1982, and has today, no interest in effectively objecting to such a proposal?

The dissent responds to our question in the negative. Judge Williams argues that AT & T has no institutional interest in *competition* in the interexchange market, and thus to read the decree to allow AT & T to object to any sort of BOC entry into that market—including a complete and full-scale entry—is to sanction a broad "allocation" of telecommunications markets in contradiction to the purpose of the antitrust laws. Dissent at 1243-44. That argument, which has the virtue of boldly confronting the core problem with appellants' case (even if it is an argument that neither appellants nor the government dare make), is nothing less than an attack on the very premise of the consent decree. AT & T today, after all, has the same economic interest vis-a-vis the BOCs' effort to gain access to the interexchange market that MCI (the company that first sought to compete against the Bell System in the interexchange market) had at the time the government's lawsuit was brought against the Bell System. MCI then, and both AT & T and MCI now, seek to confine the BOCs to that portion of the telecommunications market in which they enjoy a historical natural monopoly.

Certainly there is nothing in the language of the decree that suggests that AT & T should be thought unconcerned with the line-of-business restrictions, so that it should be regarded as not a "real" party with respect to those matters. It is not, as our dissenting colleague puts it, that we "assume[] that just because the Department of Justice and AT & T are parties to the same contract, and both have interests in the line-of-business restrictions (one acting for the public, the other for its shareholders), it follows that they must have identical rights in relation to those restrictions." Dissent at 1245. To the contrary, section III treats AT & T as a formal party to the *entire* decree,[12]

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[12] Section III provides in relevant part (with emphasis added):

with specific authority under section VII to demand enforcement of *any* section of the agreement. Indeed, in a 1987 filing in the district court, the government stated that AT & T "ha[s] the right to seek enforcement [of a line-of-business restriction] . . . itself at any time," citing section VII.[13] Nor have we been shown any precedent applying a variable standard to judge a suggested modification of general language of a decree, depending on which party objects.[14]

Appellants have, nevertheless, combed the multitude of documents filed and hearing transcripts generated during the decree approval proceedings and have found numerous examples of Bell System representatives (who now work for AT & T) professing opposition to the line-of-business

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> The provisions of this [decree] applicable to *each* defendant and each BOC, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns, ...

The dissent makes the interesting point that under our reading of the decree, a BOC would be able to contest another BOCs' effort to relax a line-of-business restriction. *See* Dissent at 5. That may seem an unlikely occurrence today, but, in any event, we see no reason why that would necessarily be thought undesirable. We will await a concrete case, however, to say any more on that scenario.

[13] Section VIII(G), which Judge Williams reads as establishing a "clear entitlement[]" for AT & T to move for judicial resolution, Dissent at 1244, speaks of actions by "a party or a BOC"—virtually mirroring the "any of the parties . . . [or] a BOC" language of section VII.

[14] *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 61 S.Ct. 666, 85 L.Ed. 975 (1941), upon which the BOCs rely, seems if anything to cut against their position. There the Supreme Court reversed in relevant part a district court opinion approving a proposed antitrust decree modification (apparently under the public interest test; the decree contained no provision like section VIII(C)) with instructions to "adjust *the right which belongs to Panhandle* with full regard to that public interest which underlay the original suit." *Id.* at 509, 61 S.Ct. at 669 (emphasis added). Panhandle's opposition to the change was not, therefore, considered irrelevant—as appellants would have us consider AT & T's—even though Panhandle was merely an *intervenor* whose rights under the decree were expressly limited.

restrictions or acceptance of them simply as a step towards an overall settlement. Appellees in turn point to some statements demonstrating more affirmative interest in the prohibitions. But what are we to make of these offerings? After all, the Bell System (pre-divestiture AT & T) had been defending itself for decades—and presumably would have continued defending itself if the settlement negotiations failed—on the ground that vertical integration of telecommunications businesses is efficient and pro-competitive. The Bell System representatives also faced a significant inherent conflict of interest: post-divestiture AT & T, as an interexchange carrier and equipment manufacturer, would obviously favor a complete prohibition on competition from the powerful local monopolies, while the post-divestiture BOCs would undoubtedly desire no such restrictions. The Bell System's duty at the time was, of course, to maximize the combined future value of AT & T and the BOCs for its (and soon to be their) shareholders. *See United States v. Western Elec. Co.*, 797 F.2d 1082, 1088 (D.C.Cir.1986), *cert. denied*, 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 698 (1987). Perhaps to satisfy that obligation perfectly was psychologically impossible, but we presume that the negotiators fulfilled their duty and thus that the decree, and especially the section II(D) prohibitions at its core, represents a balanced amalgamation of benefits to and burdens upon *both* AT & T and the BOCs. For that reason, we think recourse to the decree's bargaining history to interpret how those who were negotiating for the *unified* Bell System saw the benefits and burdens distributed between post-divestiture AT & T and the BOCs is of little use today. *Cf. Triennial Review Opinion*, 900 F.2d at 293 (decree negotiating history may be useful in other contexts).[15]

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[15] Even were we to determine that AT & T must assert a cognizable and unique interest (vis-a-vis other interexchange carriers) in the CCS waiver in order to be entitled to put the BOCs to their proof under

The Justice Department, although it does not go so far as our dissenting colleague in challenging the consent decree as an anti-competitive division of the telecommunications industry, does caution that we should not "interpret" the decree to give AT & T a "strong incentive to oppose pro-competitive decree modifications in order to protect itself from the very competition such modifications could promote." This contention is, as the dissent elaborates, sort of a variation on the antitrust injury doctrine. *See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-13, 107 S.Ct. 484, 488-91, 93 L.Ed.2d 427 (1986). But if, as the dissent suggests, AT & T should not be thought to have "antitrust standing" to assert its apparent rights under the decree because the BOCs' entry into the interexchange market would come at AT & T's expense, Dissent at 1247-48, then it follows that MCI should not have had standing to file suit, *see MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983), or to complain to the Justice Department, concerning the Bell System's activities in the interexchange market in the first place. That AT & T is now the largest carrier in the interexchange market hardly immunizes it against antitrust injury from new competitors who are monopolists in the local exchange markets. The flaw in our colleague's reasoning, we respectfully suggest, is that he entirely ignores the potential anti-competitive leverage

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section VIII(C), it appears that AT & T would qualify. Pursuant to the reorganization plan implementing the decree, the Bell System's widespread signaling facilities were allocated to AT & T; these assets would be devalued—and therefore AT & T's "rights," narrowly expressed, would be infringed—if the BOCs could provide signaling on a centralized basis so that other interexchange carriers were spared the costs of investing in such far-flung facilities. As we have indicated, however, we do not think such a particular examination of AT & T's rights and interests is called for under the decree in order to conclude that AT & T has every right to force a section VIII(C) examination of the CCS proposal.

that the BOCs' monopoly position in the bottleneck local markets affords their entry into the interexchange markets.[16]

Insofar as the government believes that there are pro-competitive aspects of a BOC's proposed "reentry" into part or all of the interexchange market, it can aid the BOC in seeking to meet the section VIII(C) test by showing that the proposal will enhance rather than impede competition. The government expresses particular concern that AT & T might somehow use its rights under section VIII(C) to handicap its *existing* interexchange competitors by making it more difficult for the BOCs to provide services to those competitors in the interexchange market. We note, however, that AT & T's fiercest competitor, MCI, supports AT & T's construction of the decree, and that although the BOCs claim that AT & T's smaller competitors would benefit from both the CCS proposal and their construction of the decree, none of those companies appeared before us. It should be remembered that section VIII(C) does not give AT & T the power to veto truly pro-competitive line-of-business modifications, only to block those changes that are quite possibly, though not certainly, anti-competitive.

In any event, as MCI observes, the question before us is not how we would fashion the decree if we were writing on a clean slate. The decree is not ambiguous; it gives AT & T the right, as a party to the decree, to assert its objection to the BOCs' proposal and thus to invoke section VIII(C). Until this case, the government never even suggested that the decree could be read otherwise.

We are thus persuaded by AT & T's argument that the CCS waiver must be judged according to section VIII(C)'s

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[16] Of course, in this case, as we discuss further below, the BOCs are not just *entering* a competitive market, they are expanding the boundaries of their monopolies to render a portion of the interexchange market apparently non-competitive. *See infra* page 1242.

standard, for whenever a modification implicates the line-of-business restrictions and is contested by *any* of the parties to the decree, the section VIII(C) test governs.[17] Even if we had doubts, however, we think our prior decisions in the *Triennial Review* and *NYNEX Procurement* cases would deter us from accepting appellants' argument. It may be, as the BOCs contend, that the premise we here reaffirm—that AT & T's opposition makes a line-of-business modification "undeniably 'contested,' " *Triennial Review Opinion*, 900 F.2d at 292, regardless of the government's position—was not forcefully argued in those cases. The BOCs did assert to the district court in *Triennial* that AT & T had no interest under the decree in the line-of-business restrictions. On appeal, the Companies referenced that argument but emphasized the converse point—that AT & T's acquiescence in the removal of the information services ban left that proposal uncontested (notwithstanding the opposition of other interexchange carriers that were not decree parties). We were, therefore, clearly focused on the significance of AT & T's position, and *but for* AT & T's opposition, we would have reversed and remanded the manufacturing portion of *Triennial* just as we did the information services portion. Indeed, in discussing the latter proposal, we explained that "[f]or purposes of identifying the proper standard of review, the critical point is that neither AT & T nor the DOJ opposed the . . . motion." *Id.* at 305 n. 27 (emphasis omitted). And in the *NYNEX Procurement Opinion* we again viewed AT & T's position as pivotal, directing the district court on remand to apply the section VIII(C) standard if AT & T had properly contested the (government-supported) waiver. *See* 907 F.2d at 1209.

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[17] It is therefore again unnecessary to decide what standard would govern a contested modification proposal, filed under section VII and either brought by or supported by the government, that does not implicate section II(D). *See Triennial Review Opinion*, 900 F.2d at 294 n. 12.

The proposition that AT & T's position on a proposed line-of-business modification can be determinative of whether the section VIII(C) test applies has thus been a linchpin of two of our opinions. Although it is true that we cannot be said to have *held* that AT & T's opposition makes a requested modification contested—because the point was not directly controverted—we do not think that the Companies can opportunistically, after so much litigation involving *the same parties*, switch their position and challenge that proposition at this late date. *Cf. Northwestern Ind. Tele. Co. v. FCC*, 872 F.2d 465, 470 (D.C.Cir. 1989), *cert. denied*, 493 U.S. 1035, 110 S.Ct. 757, 107 L.Ed.2d 773 (1990); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-90 (D.C.Cir.1984) (per curiam).

III.

The appellants' submissions to the district court were not clearly focused on the section VIII(C) test—that is, on demonstrating that the CCS waiver posed no substantial possibility of impeding competition in the interexchange services market. Nor are their appellate briefs primarily directed to this point. We are rather disappointed, particularly in light of our remarks in the *Triennial Review Opinion* as to the importance of the DOJ's predictive economic analysis, *see* 900 F.2d at 297-98; *accord NYNEX Procurement Opinion*, 907 F.2d at 1209, that the Department's market analysis in this case was so perfunctory. *See Reconsideration Opinion*, Mem. at 2. Based on the existing record, we do not see how the district judge's conclusion that the Companies' proposed waiver does not meet the section VIII(C) test, *see Waiver Opinion*, 131 F.R.D. at 652, can be thought erroneous. *See Triennial Review Opinion*, 900 F.2d at 293-94 (discussing standard of review in section VIII(C) cases).

In the *Triennial Review Opinion*, we determined that the BOCs cannot "impede competition," as that phrase is used in section VIII(C), unless they will possess market

power—the ability to restrict output and/or raise prices—in the market they seek to enter via the proposed decree modification. *See* 900 F.2d at 296. Although neither the parties nor the district court performed a detailed market definition, it appears, as we have noted, *see supra* note 11, that the CCS waiver would allow the BOCs to enter the interexchange services market.[18] The district court determined that by transmitting network control signals across LATA boundaries, the BOCs would "adversely affect" a "vital" aspect of existing interexchange competition: interexchange carriers can, and apparently do, compete on the basis of being able to provide over the widest area the superior "network architecture, improved billing, new and unique services, faster call setup," and other advantages of CCS signaling. *Waiver Opinion*, 131 F.R.D. at 650; *see also Reconsideration Opinion*, Mem. at 2. The submissions of the DOJ and Ameritech (in a filing signed by the Companies' appellate counsel) also conceded that signaling can be used in differentiating interexchange service.

The BOCs contend, however, that they merely want to offer an existing exchange access service—the provision of network control signaling—in a very similar (same content and ultimate destination, different interconnection point) but much more efficient manner. This would not "impede competition" in any *meaningful* way, they claim, because they would still lack market power in the interexchange services market as a whole. There would be no control over output, it is asserted, because the decree requires the Companies to provide signaling with every interexchange call, however many there are. As for price, appellants suggest that the cost of interexchange calls would in fact

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[18] We do not foreclose reexamination of the market definition in future cases, however. It may be that there are relevant submarkets or a developing signaling market, although none has been identified thus far.

decline because the Companies would not be required to install and operate expensive and unnecessary STP pairs in every LATA (and will pass on the savings as lower access charges), nor would interexchange carriers have to invest in CCS links to every LATA. Appellees and the district court simply failed to confront, appellants argue, this absence of market power. Section VIII(C), however, places the burden of proof on the BOCs, *see NYNEX Procurement Opinion*, 907 F.2d at 1208; *Triennial Review Opinion*, 900 F.2d at 304, and we think that they (even with the DOJ's assistance) have not carried that burden.

In our previous cases, the BOCs sought to enter all or part of a section II(D) market in order to compete with the companies alrady in that market. *See, e.g., NYNEX Procurement Opinion*, 907 F.2d at 1209 (observing that NYNEX wanted to compete with the thousands of firms already in the telecommunications equipment distribution market). Here, by contrast, the BOCs hope to take a piece of the interexchange market completely out of competition. If the CCS waiver is granted, the Companies' putative "competitors"—the interexchange carriers that currently provide inter-LATA signaling services—will be able to obtain CCS signaling *only* at centralized points, at whatever access charge the Companies demand (subject, as are the Companies' other monopoly services, to government regulation).[19] And the slice of interexchange competition foreclosed, even if narrow today, could prove difficult to confine. *See Waiver Opinion*, 131 F.R.D. at 651; *see also Triennial Review Opinion*, 900 F.2d at 309 n. 29 (noting concern over "the practical difficulty of enforcing a merely

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[19] Access charge regulation is also relevant to the concern that a BOC foothold in the interexchange market would create an incentive for exchange access discrimination against certain interexchange carriers. *See Waiver Opinion*, 131 F.R.D. at 651. The uncertain effectiveness of existing regulation was a principal reason for our denying the Companies' full-fledged entry into the interexchange services market in the *Triennial Review* case. *See* 90 F.2d at 300-01.

partial repeal of [a section II(D)] ban" (emphasis in original)).

Appellants claim that any reduction in interexchange services competition will be insignificant because many small interexchange carriers cannot afford to install CCS links to every LATA, leaving only AT & T and perhaps a couple of other carriers offering CCS services to those areas—which is hardly the basis for vigorous competition. To the extent that appellants contend that the decree should be interpreted to aid the minnows against the trout, such as AT & T and MCI (effectively devaluing the investments those companies have made in extending their CCS networks to more LATAs), they are simply wrong. *See Waiver Opinion,* 131 F.R.D. at 652 (citing *Triennial Review Opinion,* 900 F.2d at 296). To the extent that appellants argue that without centralized STPs *no* competition over interexchange CCS signaling will exist in *some* LATAs, their position is undercut by their insistence on a blanket, nationwide waiver rather than transitional waivers for only those particular LATAs—waivers that AT & T has stated it would not oppose and that we too would be likely to view sympathetically, *see Gateway Opinion,* 907 F.2d at 164-65; *see also LATA Opinion,* 569 F.Supp. at 996 n. 27, 1004 n. 62 (noting that LATAs were intended to be large enough to cost-justify service by several interexchange carriers and not just AT & T).

We are quite skeptical, moreover, about the principal benefit claimed by the appellants—the costs that the BOCs could avoid if the CCS waiver were granted—because even if the savings were large,[20] they might be entirely irrel-

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[20] The district court discounted the significance of the savings. *See Waiver Opinion,* 131 F.R.D. at 650 & n. 7. And intervening developments appear to support the view that installing STP pairs in every LATA is not cost-prohibitive (if perhaps not most cost-efficient). These include the Companies' ongoing deployment of additional STP pairs and the FCC's recent order effectively requiring the Companies to provide

evant to the section VIII(C) analysis. Savings passed on to the Companies' local ratepayers (or shareholders) would not provide any competitive benefit to the market the Companies seek to enter. *See Triennial Review Opinion*, 900 F.2d at 296. Only if the savings were passed on to the interexchange carriers (and then to their customers) would prices for interexchange calls be affected. Appellants have not demonstrated that any savings from the CCS waiver would necessarily (or even likely) result in lower (or even stable) access charges.

* * * * * *

Perhaps a stronger case can be made than that which the appellants mounted, but on this record the judgment of the district court is affirmed.

It is so ordered.

STEPHEN F. WILLIAMS, Circuit Judge, dissenting:

The 1982 consent decree resolving the Department of Justice's protracted antitrust suit against the Bell System included so-called "line of business" restrictions. See Section II(D) of the decree. *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), decree published, *id.* at 226-34. These bar each of the Bell Operating Companies (the "BOCs") from entering specified sections of the telecommunications industry. Hitherto, so far as I know, Section II(D) has not been recognized as a market-allocation agreement between the separate firms into which the Bell System was split—new AT & T (which I call simply AT & T, referring to the pre-decree entity as the Bell System) and the BOCs. The court's present decision gives Section II(D) that effect.

CCS interconnection in virtually every LATA by April 1993 to allow "portability" of 800 numbers, *see Provision of Access for 800 Service* (CC Docket No. 86-10), FCC 91-249 (released Sept. 4, 1991).

Narrowly conceived, the issue is which of three possible standards established by our decision in *United States v. Western Elec. Co.*, 900 F.2d 283, 305-07 (D.C.Cir.1990) ("*Triennial Review*"), should govern a request by the BOCs to relax the line of business restrictions when the United States Department of Justice, *sole plaintiff* in the original antitrust suit, *favors* the change: (A) For "uncontested" modifications, the "public interest" standard of the Tunney Act (15 U.S.C. § 16(b)-(h) (1988)) controls, calling for approval if the change is "within the reaches of the public interest". See Maj.Op. at 1239. (B) For "contested" modifications there are two alternatives. Changes in the BOC "line of business" restrictions are governed by Section VIII(C), requiring the applying BOC to show that there is "no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter"; other contested changes are governed by *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932), requiring "a clear showing of grievous wrong evoked by new and unforeseen conditions". As the proposed changes are in the definition sections that give meaning to Section II(D)'s "line of business" provisions, the real choice here is between the "public interest" standard and Section VIII(C). See Maj.Op. at 1236-37. Under *Triennial Review*, Section VIII(C) controls only if the change is "contested" within the meaning of that opinion.

The majority here rules that AT & T's opposition is enough of a "contest" to make a line-of-business change "contested" even when the Department of Justice approves. Thus the rump of the original *defendant*, a firm that has no institutional interest in favoring competition in interexchange markets, simply by crying *nyet* can displace the standard normally governing changes that are not contested by the original plaintiff. While it is of course true that the "line of business" restrictions originated in the Justice Department's belief that they were necessary to *facilitate* competition, the Department believes that the

modifications here proposed "would promote interexchange competition". Brief of United States at 38. The upshot is that restraints originally devised in the name of enhancing competition have now become a private anti-competition agreement between potential competitors (AT & T and the BOCs), to be cheerfully enforced by the courts at the behest of a private party that (naturally) resists intrusion on its turf.

* * *

The starting place for any possible AT & T entitlement to shift the applicable standard is obviously the agreement itself. The only material language—apart from the substantive provisions themselves—is in Section VII:

> *Retention of Jurisdiction*
>
> Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

It is evident from the heading of this provision and its first six words that it was inserted to ensure that the district court would have jurisdiction over all disputes arising under the decree. It thus rejected the usual rule that the court of the original decree has no special position as to such disputes, *Washington Hospital v. White*, 889 F.2d 1294, 1299 (3d Cir.1989), doubtless to achieve litigation economies for all participants. The balance of the sentence is aimed at assuring that *all* disputes arising under the decree could end up in the district court, and not just some. Thus the provision does not address the narrow

issue of whether AT & T was to be considered "a formal party to the *entire* decree", Maj.Op. at 1238 (emphasis in original), or (if it were) what specific rights AT & T thereby secured.

Nor is Section III of any help: "The Provisions of this [decree] applicable to each defendant, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns . . . ." The section is carefully phrased to make sure that the burdens imposed on then-present entities—and only those burdens—should reach any later components or offspring of the burdened firms. It says nothing about who is allowed to enforce any specific element of the decree. Compare Maj.Op. at 1238-39 & n. 12.

Some parts of the decree directly burden AT & T, such as Section I(D), barring post-divestiture AT & T acquisition of stock or assets of any of the BOCs. Some parts provide AT & T with clear entitlements, such as Section VIII(G)'s rule on how to resolve conflicts over the allocation of assets used before divestiture by both AT & T and a BOC, and Section II(B)'s ban on BOCs' discriminating between AT & T and others. (While doubtless arising out of concern about *pro*-AT & T discrimination, it is phrased so as to run both ways and no reason appears why it should not.) The substance of these burdens and benefits is such that we may safely infer that the parties intended that AT & T would be a party to their enforcement in every sense of the word. For these, AT & T's role as party scarcely depends on Section VII.

The logic of the line-of-business restrictions is quite different. They originated, as the majority correctly notes, Maj.Op. at 1238, in the Justice Department's belief that the Bell System had used its local service monopoly to achieve market power in adjacent fields and its concern that the BOCs would do likewise. As such, the restrictions seek, perhaps ironically, to enhance competition by restricting competitive entry. Obviously such a device is

rather delicate, even in the hands of the Justice Department or courts, as competitive values are on both sides of the issue. But as an agreement between private firms, the line-of-business restrictions of Section II(D) are simply an agreement of potential competitors to divide the market—*i.e.*, a *per se* violation of the Sherman Act, see *United States v. Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). We should be slow to give the section a role in such obvious tension with the purposes of the antitrust laws. Nothing in Section VII justifies our doing so.[1]

Of course the Department of Justice might conceivably have put its imprimatur on an agreement by which Bell divided itself and provided that all of the new firms would have contractual rights against competitive threats from each other. As the text of the decree suggests no such purpose, one might find it in the *structure* of the relations of the parties, and I gather that is the majority's purpose in its discussion of the Bell System's pre-break-up goals. Maj.Op. at 1239. As the majority correctly observes, before divestiture the Bell management's duty and, presumably, intention were to maximize the System's value; with divestiture in prospect, this meant maximizing the combined value of the future AT & T and of the BOCs. See *id.* at 1239. The majority apparently assumes that that must have entailed supporting enforcement power for AT & T, for it concludes that as it "presume[s] that the negotiators fulfilled their duty", there is no need to look at what was actually said about future AT & T's rights in the restrictions. *Id.*

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[1] By contrast the decree in *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 61 S.Ct. 666, 85 L.Ed. 975 (1914), "explicitly reserved certain rights" to Panhandle, *id.* at 504, 61 S.Ct. at 667, and these were the rights that Panhandle sought to vindicate in court, see *id.* at 509, 61 S.Ct. at 669. Thus the case is not relevant. Cf. Maj.Op. at 1239 n. 14.

In fact, however, there is no special reason to believe that the Bell System management would have been likely to think that the future AT & T's gain from any increment in restrictions would be enough to offset the BOCs' loss. Equally so for post-decree modifications; if the Bell management expected that relaxations would on a net basis decrease the value of the aggregate, it would have tried to give the future AT & T the special hold over VIII(C) changes that the court here finds; otherwise not. Either result is theoretically possible, depending on the relative abilities of the different Bell components to exploit the competitive advantages they enjoy in their own markets. But without detailed information about those advantages, there is nothing inherent in the pre-divorce structure of the Bell System that gives us a reason to impute to it a desire to secure such a special position for AT & T.

In one respect, the majority's view is in obvious contradiction with the structure of the Bell System as divestiture approached. Under the majority's view that the language of Section VII unambiguously gives AT & T rights to enforce and preserve the line-of-business rules, its reading must sweep in the BOCs as well. Thus *each BOC* is entitled to insist on the Section VIII(C) standard as to a line-of-business change sought by any other BOC, such as Ameritech's seeking some relaxation of restrictions that would enlarge the scope of its competition with NYNEX. But it is hard to see how such veto proliferation could be in any of the parties' interests—either the Department of Justice's interest in competition, or the Bell System's interest in maximizing its aggregate value.

The majority assumes that just because the Department of Justice and AT & T are parties to the same contract, and both have interests in the line-of-business restrictions (one acting for the public, the other for its shareholders), it follows that they must have identical rights in relation to those restrictions. It is clear, however, that in multiple-party contracts not every party will necessarily have a

right to enforce every duty of every other party; lines of entitlement may be single, not multiple. The general point about separate right-duty relations typically arises in a slightly different context, with a single obligee claiming that multiple obligors' duties are joint, so that it may enforce all its rights against either. In that context, courts do not create the kind of duty sprawl that the majority indulges here; the rights and obligations of each party may be several as well as joint, to whatever extent the parties intend. See Restatement (Second) of Contracts §§ 10, 288 & comment d (1981) ("if one party promises one performance, and another promises a different performance, each may be bound independently of the other and the promisee may be entitled to both prformances"); 4 Corbin, Contracts §§ 926, 940 (1951). Compare *Over the Road Drivers, Inc. v. Transport Ins. Co.*, 637 F.2d 816 (1st Cir.1980), which held that an insurer could not offset its debt to one of several insureds under a single policy by moneys owed to it by the other insureds. Even though there was a single policy and the insureds were closely related, the court found their rights and obligations distinct. It would follow that if one of the insureds had wanted to modify its obligations under the contract, the others would have no power to convert such an uncontested modification to a contested one (governed by *Swift* if the agreement were a consent decree)—even if in some way these others would be incidentally injured by the modification (for example, if the modification would turn the insured that sought it into more of a competitive threat to the others). More generally, if various obligors (AT & T and the BOCs) are bound independently to one or more obligees (the Department of Justice, as well as each other), even in a single contract, each obligation runs only to those whom it was intended directly to benefit (and similarly the right to seek or oppose a modification of an obligation). An obligation will not run automatically to every party that might incidentally derive a benefit.

To the extent that the text and structure leave doubt, we should turn to "contemporaneus statements of [the decree's] objectives". *Triennial Review*, 900 F.2d at 306 (citations omitted). In fact, Bell expressed only hostility to the restrictions. Counsel for the Bell System told the distgict court prior to approval of the decree that the Bell System was "against restrictions" on the BOCs, and that it agreed to them only "because Justice required it as a part of the bargain." Joint Appendix ("J.A.") 181-82; see also *American Tel. & Tel. Co.*, 552 F.Supp. at 186 n. 227. Bell also told the FCC that the restrictions were not "our idea. We'd be happy to have [the BOCs] unrestricted". See J.A. at 126-27. The statements that AT & T throws against these, and which the majority says demonstrate "more affirmative interest in the prohibitions", Maj.Op. at 1239, are quite weak. In one set of comments to the district court Bell affirmed its commitment to the restrictions, but "as part of its overall bargain for the Decree', J.A. at 145, stressing that the Department of Justice promised periodic reviews, *id.* at 146. AT & T points to one filing with the court in which Bell defended the decree against the contention that the BOCs would not be viable. *Id.* at 166-77. But this defense came right after a statement that Bell "has acknowledged the importance of [the] restrictions to the Justice Department's theory of this Decree .... [This] discussion[] will not be repeated here." *Id.* at 166. That Bell signed and defended the Decree, in the interest of avoiding the costs and risks of litigation, does not mean that it desired the restrictions, or even that it thought they mitigated the break-up. The contemporaneous evidence shows, on the contrary, that Bell was at least ambivalent and probably hostile to the restrictions.

The contract language, and the structure and history of the negotiation, do not support an inference that every one of the parties was given the right to obtain, through opposition to a change, application of the VIII(C) standard. That being so, we may search for default rules. The com-

mon law has addressed a cognate problem—whether those who acquire portions of a burdened estate may sue each other to enforce an equitable servitude benefiting a third party. The answer is no, unless the estate was subdivided pursuant to a common plan or scheme. See *Korn v. Campbell*, 192 N.Y. 490, 85 N.E. 687 (1908); American Law of Property § 9.34 (1952). Analogously, there is no reason to infer a power in AT & T (and each of the BOCs) to enforce the line-of-business restrictions. The policy in both cases is to deny strangers the legal means to interfere with each other's private affairs in the absence of a clear directive. More narrowly, by limiting the flow of the beneficial interest to successors of the original beneficiaries, it prevents the benefit from going to unintended parties; it thus enhances flexibility by allowing the obligor to secure changes through negotiation with a relatively narrow class of parties—only those with a genuine expectation or reliance interest.

More acutely relevant is the antitrust standing doctrine, which requires an antitrust plaintiff to allege an "antitrust injury", i.e., one "of the type the antitrust laws were designed to prevent and that flows from that which makes defendant's acts unlawful." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113, 107 S.Ct. 484, 491, 93 L.Ed.2d 427 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977)). Rushing in at the behest of one whose interest lies in diminished competition is likely to "chill the very conduct the antitrust laws are designed to protect". *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594, 106 S.Ct. 1348, 1359-60, 89 L.Ed.2d 538 (1986) (addressing predatory pricing claims). If a BOC were really to reduce competition in interexchange services, so that output were restricted and price increased, AT & T as the largest carrier in that market would benefit, *except* to the extent that the business acquired by the entering BOC cut into AT & T's. AT

& T's opposition is thus at least as easily chalked up to fear of enhanced competition as to any genuine concern for its reduction. Here, as in *Cargill,* AT & T is really objecting to a potentiality of later anticompetitive conduct, of misbehavior after entry rather than any *antitrust injury* that would flow from entry itself. To read the decree as assigning AT & T special rights against modifications of the line-of-business rules is to allow it just the sort of preemptive strike against competition that the Court rejected in *Cargill.*[2]

Of course the fact that the parties occupy adjacent fields does not mean in itself that one cannot have antitrust claims against conduct of the other, such as MCI's original "essential facilities" and predatory pricing claims against the Bell System. See *MCI Communications Corp. v. American Tel. & Tel. Co.,* 708 F.2d 1081 (7th Cir.1983). Those are a far cry from the simple market division that AT & T seeks to enforce here. Compare Maj. Op. at 1240.

The majority insists that here the modification would cause AT & T a genuine antitrust injury: the BOCs "are expanding the boundaries of their monopolies to render a portion of the interexchange market completely non-competitive." *Id.* at 1240 n. 16. But in fact the BOCs propose only to change the *means* of implementing the monopolies granted to them by state law, shifting to more efficient

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[2] The parties and this court seem to have assumed all along that AT & T has standing to challenge modifications in the line-of-business restrictions. Given its clear commercial interest, there seems little doubt that the Constitutional minimum is satisfied. See *Warth v. Seldin,* 422 U.S. 490, 498-502, 95 S.Ct. 2197, 2204-07, 45 L.Ed.2d 343 (1975). As the Tunney Act gives the district judge a great deal of discretion when making a public interest determination to include various entities as parties, intervenors, amici, or any other kind of participant, 15 U.S.C. § 16(f)(3), prudential standing is also present. But to say that AT & T has standing to sue is not the same as saying that it has the power, by its opposition, to change the standard for approval of a modification.

ways for handing off signals generated in their region to the interexchange carriers.

The majority also argues that its holding is required by precedent. *Id.* at 1240-41. In *Triennial Review* and in *United States v. Western Electric Co.*, 907 F.2d 1205 (D.C.Cir.1990) ("*NYNEX Procurement*"), this court applied (or directed the district court to apply) the Section VIII(C) standard to analyze decree modifications proposed by the BOCs and DOJ and resisted by AT & T. In neither case, however, was it argued that Section VII should apply to such modifications, cf. Maj. Op. at 1241 (chiding BOCs for failure to raise point in earlier litigation), and so in both cases the court assumed that Section VIII(C) applied without deciding the issue. The BOCs' reference on appeal in *Triennial Review* to AT & T's lack of opposition to the modification of the information services ban did not "clearly focus[]" the court on the issue, cf. Maj. Op. at 1241, as no party was arguing that this lack of opposition foreclosed application of Section VIII(C). It may be that "*but for* AT & T's opposition, we would have reversed and remanded the manufacturing portion of *Triennial* [for application of Section VII] just as we did the information services portion", Maj. Op. at 1241 (emphasis in original), but that assumes we would have seized upon an unraised issue. Cf. *Independent Ins. Agents of America v. Clarke*, 955 F.2d 731, 741-44 (D.C.Cir.1992) (dissent).

* * *

As the majority explains, the public interest standard—the common law standard for unopposed modifications of consent decrees—is quite relaxed. The proposed modification need only be "within the *zone of settlements* consonant with the public interest today." See *Triennial Review*, 900 F.2d at 307 (emphasis in original). Because the district court has not yet applied the correct standard, and because we sit as a court of review, I would remand

the case to the district court for application of the proper standard for uncontested modifications.

APPENDIX B

United States District Court,
District of Columbia

Civ. A. No. 82-0192 (HHG).
131 F.R.D. 647

UNITED STATES of America,

Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., et al.,

Defendants.

July 13, 1990.

MEMORANDUM

HAROLD H. GREENE, District Judge.

US West, one of the Regional Companies, has filed a motion for a declaratory ruling, or in the alternative, for a waiver of the decree restrictions, to permit it to provide common channel signaling interconnection on a centralized basis in lieu of installing the requisite interconnection in every LATA. The other Regional Companies not only support the US West request, but each of them asks for similar treatment on its own behalf. AT & T and MCI, on the other hand, oppose the motion, while the Department of Justice and several other interested parties, including some of the smaller interexchange carriers, oppose the declaratory judgment part of the motion but support the requests for waivers.

I

The requests for a declaratory judgment present little difficulty; it is plain under the decree that it must be denied. Signaling is and always has been an integral part of telecommunications traffic, including interexchange traffic. Moreover, each inter-LATA communication must include information with its signaling that dictates, in addition to the destination of the called party, the interexchange carrier selected to reach that party. On this basis, the decree specifically includes the "provision of network control signaling" in the definition of exchange access—a function which under the decree is to be performed by the Regional Companies. Section IV(F) of the decree.[1]

It is equally clear from the language of the decree that the Regional Companies are required to deliver exchange access traffic to the interexchange carriers at points of presence (POP) in every LATA. Section IV(F) explicitly directs that the exchange access services "shall be provided by facilities in a [a LATA]" for the "delivery of and receipt of [interexchange traffic] at a point or points within the [LATA] designated by an interexchange carrier." And in its Opinion approving the AT & T plan of reorganization, the Court explained, once again, that the Regional Companies must "deliver traffic originating or terminating within a LATA to a point of presence (POP) within the LATA." *United States v. Western Electric Co.*, 569 F.Supp. 990, 994 and n. 13 (D.D.C.1983), *aff'd*, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed.2d 719 (1983).

Surprisingly, in view of the Regional Companies' general opposition to decree construction based on purpose where

[1] US West concedes that the delivery of signaling to the interexchange carriers is an exchange access service, Motion at 9, and so does the Department of Justice. Memorandum at 2.

the language of the decree is unambiguous,[2] US West and the other Regional Companies argue, in effect, that the Court should disregard the decree language and instead focus on what they term its core objectives,[3] such as the public interest in an upgrade of the long distance networks and the cost and quality of telephone service.[4] These public interest factors, too, are considerations which the Regional Companies have vehemently argued in other contexts, and with some success, to be irrelevant. Thus, the Court of Appeals recently explained at the urging of the Regional Companies and the Department of Justice that, in construing the decree, this Court was not to consider such objectives as universal telephone service and hence the cost of such service to consumers.[5]

In any event, whatever these inconsistencies, what is altogether plain is that the decree language stands as a categorical obstacle to the Regional Companies' declaratory judgment requests.

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[2] *See, e.g.*, Joint Reply Brief of Regional Companies in Court of Appeals Nos. 87-5388 et al. at 12 n. 5. However, as this Court has had occasion to note several times, when it suits their business plans the Regional Companies have not been shy to rise above principle and to advocate judicial reliance on decree purpose. *See, e.g., United States v. Western Electric Co.*, 673 F.Supp. 525, 585 n. 269. Emerson has said that a foolish consistency is the hobgoblin of little minds (*Essays: First Series* (18.41))—a criticism that could not legitimately be levelled at the Regional Companies.

[3] The Department of Justice likewise abandons its recent insistence on obedience to literal decree language, advocating that the Court ignore that language in this instance. Department of Justice Memorandum at 2.

[4] *See, e.g.*, US West Memorandum at 8-9; NYNEX Comments at 10-11; Bell Atlantic Reply at 3-7.

[5] *See, e.g., United States v. Western Electric Co.*, 900 F.2d 283, 299-300 (D.C.Cir.1990). That is not to say that on the subject here under consideration the purposes of the decree and its language are not in agreement, for they are. This is a subject the Court explores below in its discussion of the requests for waivers.

II

Now as to the waiver. The Regional Companies and the Department of Justice explain that common channel signaling and Signaling System 7 (SS7-CCS), which is planned to be deployed this year or next,[6] uses a data network separate from the communications channel for transmission of network control signaling information, rather than transmitting that information over the channel used for the communication itself. The waivers should be granted, according to those supporting them, because it is now feasible to separate the signaling channels from those used for the transmission of the communications themselves, and because the installation of interfaces in just a few central points would be less expensive for the Regional Companies than the provision of the equipment in every LATA as the decree requires. *See, e.g.*, Department of Justice Memorandum at 7, 16-19; Ameritech Memorandum at 11; Bell Atlantic Reply at 3-4; Pacific Telesis Reply at 3-4; Southwestern Bell Comments at 18-20. The proponents of the waivers further argue that adherence to the decree would provide no advantage to the public. Department of Justice Memorandum at 19.

In the first place, it is most doubtful that the Court would be justified in light of recent appellate decisions to ignore the language of the decree in order to provide to the Regional Companies the collateral benefit of a savings of a relatively small amount of money.[7] Cost alone has

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[6] According to the Department of Justice, some of the Regional Companies are planning to make SS7 interconnection available beginning "perhaps as early as mid-1990, or in early 1991." *See* Memorandum at 6 and n. 10. US West plans on interconnection of the Regional Company CCS networks in the fall of 1990. US West Reply at 12.

[7] As has been pointed out, the cost to US West, for example, of delivering service in each LATA as the decree requires will, by its estimate, be $60 million initially and $6 million annually. MCI Opposition at 12. However, this amount constitutes only .0085 of the $7 billion US

never been regarded as a reason for deviating from the requirements of the decree. Divestiture was a costly process, and the costs involved were deemed justified in order to create a competitive market structure of benefit to consumers, to innovation, and to an American telecommunications industry spurred to optimum performance by the traditional disciplining tool of a capitalist economy—competition. Furthermore, the Regional Companies are hardly in a position to complain of the cost of complying with the divestiture decree: as a consequence of that decree, each of them inherited thriving businesses and many billions of dollars in assets.

III

Beyond that, the grant of waivers would adversely affect long distance competition. Signaling information is vital to such competition: network control signaling can be used by a company engaged in interexchange services to distinguish itself from its competitors in such areas as better network architecture, improved billing, new and unique services, faster call set-up, and more efficient operation in other areas. And since the CCS network is a data network it can also be used to provide data and information services to end users.

Thus, if the Regional Companies were permitted to engage in this obvious interexchange function and thereby to decide whether, where, when, and how to offer interexchange services, they would become the arbiters of interexchange services, and they could shape the competition

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West has invested in its network since divestiture. *Id.* at 13. As MCI also correctly notes, "the proposition that the Regional Companies cannot afford to spend $60 million to comply with the judgment strains credulity in light of the billions of dollars Regional Companies already have invested, and continue to invest, in their exchange networks and in various unrelated businesses." *Id.* at 12. Moreover, not only does the $60 million figure appear to be inflated but, whatever the actual cost, it it likely to be recovered through local rates and access charges. *Id.* at 16.

in that field to suit their interests or even to frustrate it altogether.[8]

These factors have particular significance by virtue of the fact that each of the Regional Companies is deploying the same type of inter-LATA signaling network for which all of them now seek approval, and the companies are planning to interconnect their SS7 networks to create a nationwide Regional Company signaling system.[9] It also appears that these companies intend to offer revenue producing services (such as call completion to busy numbers on an inter-LATA basis) which represent the initial steps for commercial applications of signaling as a commodity.[10]

Almost since the date of the divestiture in 1984, the Regional Companies have consistently worked for, and expected that, notwithstanding the decree and the fact that there has been no significant change since the decree was entered, they would somehow be able to enter the interexchange business.[11] These companies have also, again almost from the first day, attempted to build upon the slightest concession from the Court as a springboard for claimed entitlements for further advances into prohibited lines of business. This Court has, on a number of occasions

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[8] *See United States v. Western Electric Co.*, 583 F.Supp. 1257, 1259 (D.D.C.1984); 604 F.Supp. 316, 324 (D.D.C.1985).

[9] *See* letters from E.J. Morea, NYNEX Material Enterprises to R. Santoro, MCI, of October 17, 1988, and letter from D. King, BellSouth Services to M. Van Zetta, MCI, dated September 7, 1988, cited in MCI's Opposition at 17 n. 32.

[10] There is no basis whatever for the claim that such commercial messages are "official" communications since they are being offered on a commercial, competitive basis. *See United States v. Western Electric Co., Inc.*, Civil Action No. 82-0192, 1989 WL 21992 (D.D.C. January 24, 1989), slip op. at 10-11.

[11] For the most recent manifestation, *see* Joint Brief for the Regional Telephone Company Appellants in Nos. 87-5388 et al. –*United States v. Western Electric Co.*, April 17, 1989, at 13-14.

commented on this "slippery slope" syndrome. *See, e.g., United States v. Western Electric Co.*, 673 F.Supp. 525, 545 (D.D.C1987), *rev'd on other grounds*, 900 F.2d 283 (D.C. Cir.1990). Moreover, the expectation of future competition with the interexchange carriers has always represented an incentive for present Regional Company discrimination. *See United States v. Western Electric Co.*, 592 F.Supp. 846, 867-68 (D.D.C.1984), *appeal dismissed*, 777 F.2d 23 (D.C.Cir.1985).

Not only is it likely that the grant of the current motions would lead to discrimination against the interexchange carriers, the anticipated competitors of the Regional Companies, but such discrimination has already taken place. Thus, the companies apparently plan to implement SS7 for their own data base services first, and accordingly they have delayed interexchange company testing that would permit these companies to position themselves in the same market. MCI Opposition at 19. Further, Regional Company centralized SS7 architecture will substantially degrade the quality of access available to the interexchange carriers, increasing call set-up time for each 800 call by as much as 4.2 seconds. MCI Opposition at 20 n. 38.

It was the rationale of the decree, as it is the rationale of the antitrust laws, that the public will benefit from free competition, unfettered by monopolists. There is no question but that a waiver here, if granted, would injure the public, even as a grant of that waiver would save the Regional Companies some money.

IV

The Regional Companies respond that strict adherence to the decree will primarily benefit AT & T and MCI and may disadvantage the smaller interexchange carriers.[12] *See,*

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[12] Some of the smaller interexchange carriers make the same arguments. *See* Teleconnect Response at 7-8; MidAmerican Response at 4.

e.g., US West Reply at 9-11; Ameritech Memorandum at 10, 13-14; Bell Atlantic Reply at 7-8; BellSouth Motion at 14-15. The newly-founded solicitude of the Regional Companies for the smaller interexchange carriers is certainly touching; however, it cannot erase the long-established principle,[13] recently relied on by the Court of Appeals[14] that the antitrust laws in general and the decree in this case in particular are designed to benefit competition, not particular competitors.

V

Waivers under Section VIII(C) from the restrictions mandated by the decree are to be granted upon a showing by a Regional Company that "there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." *See United States v. Western Electric Co., Inc.*, 592 F.Supp. 846, 851 (D.D.C.1984); *United States v. Western Electric Co.*, 900 F.2d 283, 291, 295-300 (D.C.Cir.1990). For the reasons stated, it is the Court's conclusion that such showing has not been made but that, in addition to being offensive to the decree language, such waivers would be inconsistent with its purposes and would create a substantial possibility that the Regional Companies could use their monopoly power to impede competition in the market they seek to enter.

The motions are therefore hereby denied.

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[13] *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962).

[14] *See* 900 F.2d at 296. The Regional Companies, too, have relied on this principle many times. Thus, in the peroration of their Joint Reply Brief in the Court of Appeals, these companies argue that, by refusing to permit them to enter the lines of business prohibited to them by the decree, this Court has been engaged in the "ultimate antitrust fallacy of protecting competitors, not competition." Joint Reply Brief in No. 87-5388 et al., *United States v. Western Electric Co., Inc.*

APPENDIX C

United States District Court,
District of Columbia

Civ. A. No. 82-0192 (HHG).

UNITED STATES of America,

Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., et al.,

Defendants.

Sept. 6, 1990.

MEMORANDUM AND ORDER

HAROLD H. GREENE, District Judge.

On July 13, 1990, the Court denied the request of several of the Regional Companies for a waiver of the decree restriction against signaling information across LATA boundaries. U S West and Ameritech have moved for reconsideration of that ruling. The motions will be denied.

It is clear, and the Regional Companies do not appear to argue otherwise, that section IV(F) of the decree requires that network control signals be delivered within the originating LATA, and much of the discussion in the Regional Company papers regarding the standards for waivers of the line of business restrictions embodied in section II(D) is therefore besides the point. It is also clear that the transport of signaling messages over LATA boundaries

is an interexchange function, and whatever else the Court of Appeals decided in its April 3, 1990 opinion, it upheld the continuing validity of the restriction on entry of the Regional Companies into the interexchange market. United States v. Western Electric Co., 900 F.2d 283, 301 (D.C.Cir.1990). No cogent reasons have been advanced for a piecemeal dismantling of that restriction. On these bases alone, the motions for reconsideration must fail.

Equally unpersuasive are the Regional Companies' arguments that their provision of these services would be the most efficient method of providing them, and that they can draw substantial comfort from the support they received from the Department of Justice. Even if the argument bottomed on efficiency were correct—and there is no basis for concluding that it is—it would not override the antitrust rationale of the decree that the entry of the local monopolists with their stranglehold on exchange market would be destructively anticompetitive. As for the Department of Justice, it has not furnished economic evidence or predictions of market behavior adequate to persuade either this Court or the Court of Appeals that entry of the Regional Companies into the interexchange market is now justified.

The Regional Companies' motion is not well taken regardless of the standard and the decree provision that are applied—section IV(F), section VIII(C), section VII, or the common law standard for contested decree modifications.[1]

For these reasons, it is this 6th day of September, 1990

ORDERED that the motions for reconsideration be and they are hereby denied.

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[1] There is not the slightest support for the point made by some of the Regional Companies (e.g, Ameritech Reply at 3) that whenever they and the Department of Justice agree on a modification, it is deemed to be uncontested, irrespective of AT & T's opposition.

APPENDIX D

U.S. Const. art. II, § 1, cl. 1

The executive Power shall be vested in a President of the United States of America.

* * * *

U.S. Const. art. II, § 3

* * * *

[H]e shall take Care that the Laws be faithfully executed

* * * *

U.S. Const. art. III, § 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

* * * *

U.S. Const. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX E

United States District Court,
District of Columbia.

Civ. A. Nos. 74-1698, 82-0192.
Misc. No. 82-0025(PI).
552 F.Supp. 131, 226-34

UNITED STATES of America,

Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; Western Electric Company, Inc.; and Bell Telephone Laboratories, Inc.,

Defendants.

UNITED STATES of America,

Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., and American Telephone and Telegraph Company,

Defendants.

UNITED STATES of America,

Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants.

Modification of Final Judgment
Aug. 24, 1982.

Plaintiff, United States of America, having filed its complaint herein on January 14, 1949; the defendants having appeared and filed their answer to such complaint denying the substantive allegations thereof; the parties, by their attorneys, having severally consented to a Final Judgment which was entered by the Court on January 24, 1956, and the parties having subsequently agreed that modification of such Final Judgment is required by the technological, economic and regulatory changes which have occurred since the entry of such Final Judgment;

Upon joint motion of the parties and after hearing by the Court, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Final Judgment entered on January 24, 1956, is hereby vacated in its entirety and replaced by the following items and provisions:

I

AT & T Reorganization

A. Not later than six months after the effective date of this Modification of Final Judgment, defendant AT & T shall submit to the Department of Justice for its approval, and thereafter implement, a plan of reorganization. Such plan shall provide for the completion, within 18 months after the effective date of this Modification of Final Judgment, of the following steps:

1. The transfer from AT & T and its affiliates to the BOCs, or to a new entity subsequently to be separated from AT & T and to be owned by the BOCs, of sufficient facilities, personnel, systems, and rights to technical information to permit the BOCs to perform, independently of AT & T, exchange telecommunications and exchange access functions, including the procurement for, and engineering, marketing and management of, those functions,

and sufficient to enable the BOCs to meet the equal exchange access requirements of Appendix B;

* * * * * * *

II

BOC Requirements

* * * * * * *

D. After completion of the reorganization specified in section I, no BOC shall, directly or through any affiliated enterprise:

1. provide interexchange telecommunications services or information services;

2. manufacture or provide telecommunications products or customer premises equipment (except for provision of customer premises equipment for emergency services); or

3. provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.

* * * * * * *

VII

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

VIII

Modifications

* * * * * *

C. The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

* * * * * *

APPENDIX F

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

Civ. A. No. 83-1298 (HHG)

UNITED STATES OF AMERICA,

Plaintiff,

v.

GTE CORPORATION,

Defendant.

MEMORANDUM AND ORDER

HAROLD H. GREENE, District Judge.

GTE has filed a motion for a declaratory ruling, or in the alternative, for a waiver of the decree restrictions, to permit it to use Signaling System 7 (SS7) technology which employs facilities crossing LATA boundaries. GTE wants to use the SS7 facilities in providing alternate billing service validation service, Query Response Service, Data Base 800 Service, trunk signaling services, and similar services which may evolve using in the future using SS7 technology. AT&T and MCI are opposed to GTE's Motion. The Department of Justice supports a conditioned waiver.

SS7 is a common channel signaling system currently being deployed within the networks of the GTE operating companies, the Regional Companies, and interexchange carriers. SS7 technology uses a high speed data network that is separate from the communications channel for both the transmission of network control signaling information and for obtaining from data bases information needed for call routing or screening. The SS7 facilities include Signal

Transfer Points (STPs). GTE could install Signal Transfer Points and data bases in each of its 101 LATAs, but argues this is not economically feasible. GTE estimates the cost of doing so would be $1.515 billion.[1] GTE wants to install instead Signal Transfer Points in only nine LATAs, and use its own high speed data links to link their SS7 facilities.

I

GTE's request for a declaratory judgment is denied for reasons similar to this Court's denial of a US West motion for declaratory judgment on July 13, 1990.[2]

Delivery of network control signaling to the interexchange carriers is an exchange access service. The GTE decree specifically defines "exchange access" as including the provision of network control signaling. *United States* v. *GTE Corp.*, 1985-1 Trade Cas. (CCH) ¶66,355 (D.D.C. Dec. 21, 1984) at §II.G (hereinafter "GTE Decree").[3] The decree requires that exchange access services "shall be provided by facilities in an exchange or serving area" for the "delivery and receipt of such [interexchange] traffic at a point or points within an exchange or serving area designated by an interexchange carrier for the connection of its facilities with those of the GTOC." GTE Decree, §II.G. That is, under the plain language of the decree, GTE must provide this exchange access service at a point of presence within each LATA, and accordingly GTE's declaratory judgment request must be denied.

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[1] GTE claims the cost of a mated pair of local Signal Transfer Points is approximately $5 million, and the cost of a mated pair of data bases is approximately $10 million. *GTE Motion for Declaratory Ruling* at 6.

[2] *United States* v. *Western Electric Co., Inc.*, Civ. Action No. 82-0192, *Memorandum* (July 13, 1990).

[3] GTE in fact states that "[e]ach of the functions which the GTOCs will provide with SS-7 technology is an exchange or exchange access service." *GTE Motion for Declaratory Judgment* at 22.

II

GTE requests in the alternative a waiver of the decree pursuant to Section VII.A of the decree. GTE stresses some of the factual differences between it and the Regional Companies. GTE serves 101 LATAs which is far more than are served by any of the Regional Companies. The cost to GTE of installing STPs and/or data bases in each of its 101 LATAs therefore would be far higher than the analogous cost for a Regional Company, amounting to well over $1 billion.[4] GTE's operations are more national in scope and serve primarily the nation's rural and suburban areas, in contrast to the concentration of much of the Regional Companies' service in urban areas.[5]

While the *AT&T* decree and the *GTE* decree have generally been treated in parallel fashion, this need not be done where, as here, there is a fundamental, substantive difference between the two situations. Accordingly, the waiver to GTE will be granted.

As to GTE's request for a waiver to utilize inter-LATA queries in connection with LIDB calling card validation and 800 database access service, a waiver consistent with that granted by the Court on February 10, 1992 for the Regional Companies will also be granted.

GTE also requests a blanket ruling on "any similar services which may evolve using SS7 technology." This Court concurs with the Department of Justice that such a request

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[4] By contrast, the cost to US West of delivering service within each LATA was estimated at $60 million initially. *See United States* v. *Western Electric Co., Inc.*, Civ. Action No. 82-0192 *Memorandum* (July 13, 1990) at 6 n.7.

[5] GTE also stresses that the appropriate standard for a waiver when all parties support one is "whether the resulting array or rights and liabilities comports with the 'public interest.'" *United States* v. *Western Elec., Co.*, 900 F.2d 283, 305 (D.C. Cir. 1990).

is too broad and speculative to warrant a ruling at this time. *See Response of the United States* at 2 n. 5.

Accordingly, it is this 25th day of March 1992

ORDERED that the motion by GTE for a declaratory ruling be and it is hereby denied; and it is further

ORDERED that any GTE local exchange company (GTOC) that utilizes common channel signaling (CCS) to provide network control signaling as part of its exchange access services is not required to deliver and receive such CCS signaling within the LATA where a call originates or terminates, nor is a GTOC required to install a common channel signaling interface in each of its LATAs. A GTOC may deliver CCS for exchange access, *i.e.*, network control signaling, to interexchange carriers and other exchange access customers at centralized interfaces within its region, and a GTOC may transport such signaling between LATAs within its region for the that purpose.

PROVIDED, however, that, at the request of any exchange access customer, a GTOC that provides CCS network control signaling at centralized interface points as permitted by this order shall sort such signaling as appropriate, in accordance with SS7 or other applicable protocols, for routing to the exchange access customer's Signal Transfer Points or network switches; and it is further

ORDERED that as to transporting 800 and LIDB queries, GTE may act consistently with this Court's order of February 10, 1992.